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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 68

THE CITY OF CLEVELAND, APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY

No. 69

JOHN J. BOYLE, COUNTY TREASURER OF CUYAHOGA COUNTY, JOHN A. ZANGERLE, COUNTY AUDITOR OF CUYAHOGA COUNTY, BOARD OF COUNTY COMMISSIONERS OF CUYAHOGA COUNTY, OHIO, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

FILED APRIL 24, 1944.

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[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Civil No. 21897

UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY, Plaintiffs,

v.

JOHN J. BOYLE, County Treasurer of Cuyahoga County, Ohio, John A. Zangerle, County Auditor of Cuyahoga County, Ohio, Board of County Commissioners of Cuyahoga County, Ohio, and City of Cleveland, Defendants

COMPLAINT—Filed July 14, 1943

The United States of America and the Federal Public Housing Authority, by Don C. Miller, United States Attorney for the Northern District of Ohio; and Assistant United States Attorney, acting under instructions from the Attorney General of the United States, allege and state:

I

The jurisdiction of this court is based upon the fact that the United States is the plaintiff herein, and on the additional fact that the matter in controversy arises under the Constitution and laws of the United States and involves more than the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

II

The plaintiff, Federal Public Housing Authority, is a Government corporation, wholly owned by the United States, which was originally created as the United States Housing Authority under Section 3 of the Act of Congress of September 1, 1937 (50 Stat. 889), and is now known [fol. 3] as the Federal Public Housing Authority by reason of Executive Order No. 9070, dated February 27, 1942.

III

The defendant John J. Boyle, is the duly elected and qualified Treasurer of Cuyahoga County, Ohio, the defendant, John A. Zangerle, is the duly elected and qualified Auditor of Cuyahoga County, Ohio, the defendant, Board of County Commissioners of Cuyahoga County, is a body politic and a subdivision of the State of Ohio, and the defendant, City of Cleveland, is a municipal corporation in the County of Cuyahoga, Ohio. All the said defendants are residents of the Northern District of Ohio.

IV

On the dates hereinafter mentioned, the United States, through the Federal Emergency Administrator of Public Works, pursuant to and in order to carry out the purposes of Title II of the Act of June 16, 1933, 48 Stat. 201 (40 U. S. C. A. 401, 402, 403), acquired title to that certain real estate in Cuyahoga County, Ohio, which is described on the tax duplicates of Cuyahoga County, Ohio, as follows:

(1) Book 44, Item 532: "Original Lots 60 and 61, converse and other subdivisions. Between Cedar and Central Streets west line of East 28th to East 30th Streets."

(2) Book 44, Item 533: "Original Lots 57, 58, 59, and 60. Between Cedar and Central Streets and west line of 28th Street to a point 1102.47 feet west on Cedar."

(3) Book 44, Item 546: "Scovill Avenue to Case Court, west of East 55th Street to East 40th Street."

(4) Book 79, Item 444: "Block A, Division Street, original Lot 51 of 450.28 feet by 316.83 feet."

(5) Book 79, Item 445: "Original Lot 51 on Division Street, Block B. 416.86 feet frontage on Division Street."

[fol. 4] (6) Book 79, Item 446: "Original Lot 51, Division Street, Block F, frontage 428.23 feet."

(7) Book 79, Item 447: "Original Lot 51, on Division Street, Block G. having a frontage of 608.05 feet."

(8) Book 79, Item 453: "Original Lot 51, fronting on West 25th Street. Block C, frontage 136.57 feet."

(9) Book 79, Item 454: "Original Lot 51, West 25th Street, Block D, frontage 444.25 feet on West 25th St."

(10) Book 79, Item 455: "Original Lot 51, West 25th Street, Block E, frontage 221.31 feet on West 25th Street."

V

Title to the land referred to in subparagraphs 1 and 2 of Paragraph IV herein (now known as the Cedar Central Project), vested in the United States on September 10, 1934, pursuant to two Declarations of Taking filed on that date in condemnation proceedings instituted in the United States District Court for the Northern District of Ohio, entitled *United States* v. *Certain Lands in the City of Cleveland, Advance Loan Company, et al.*, Civil No. 18075, and *United States* v. *Certain Lands in the City of Cleveland, Charlotte Allen, et al.*, Civil No. 18076.

Title to the land described in subparagraph 3 of Paragraph IV herein (now known as the Outhwaite Project), vested in the United States on February 18, 1935, pursuant to three Declarations of Taking filed on that date in condemnation proceedings in the United States District Court for the Northern District of Ohio, entitled *United States* v. *Certain Lands in the City of Cleveland, Natale Argento, et al.*, Civil No. 18301, *United States* v. *Certain Lands in the City of Cleveland, Guiseppe Anello, et al.*, Civil No. 18302, and *United States* v. *Certain Lands in the City of Cleveland, Cleveland Trust Company, et al.*, Civil No. 18303. [fol. 5] Title to the land described in subparagraphs 4 to 10, inclusive, of Paragraph IV herein (now known as the Lakeview Terrace Project), vested in the United States on April 16, 1935, pursuant to three Declarations of Taking filed on that date in condemnation proceedings in the United States District Court for the Northern District of Ohio, entitled *United States* v. *Certain Lands in the City of Cleveland, Edward J. Aylward, et al.*, Civil No. 18368, *United States* v. *Certain Lands in the City of Cleveland, Winifred Ashley, et al.*, Civil No. 18369, and *United States* v. *Certain Lands in the City of Cleveland, Baker Raulang Company, et al.*, Civil No. 18370.

VI

Pursuant to Executive Order No. 7732, effective November 1, 1937, all right, interest and title to said land was transferred to the United States Housing Authority (now the Federal Public Housing Authority) and said land continually since the dates of its acquisition as aforesaid, up to and including the present time, has been and now is owned by the United States or its wholly owned instrumentality, the Federal Public Housing Authority. This property has been continuously used since its acquisition as a site for low-cost housing development and in connection with this use there have been constructed on said land by the plaintiffs certain buildings and structures. Since January 1, 1940, the property has been leased for active management purposes to the Cleveland Metropolitan Housing Authority, a state housing authority organized under the "State Housing Authority Law of Ohio," Sec. 1078-29 ff, Ohio General Code.

VII

This land, together with the buildings, appurtenances and improvements thereon, since its acquisition by the United States, has been immune from state taxation under the Constitution of the United States and, under Section 5 [fol. 6] of the Act of September 1, 1937 (50 Stat. 890) 42 U. S. C. A. 1409 (e), property of the United States Housing Authority (now the Federal Public Housing Authority) has been specifically declared to be exempt from all taxation by any state, county, municipality or local taxing authority.

VIII

Although said land and improvements were and are not subject to taxation, taxes have been unlawfully assessed thereon as follows:

(a) For the years 1935 to 1942, inclusive, in the sum of $512,973.45, against the Cedar Central Project referred to in subparagraphs 1 and 2 of the description in Paragraph IV herein.

(b) For the years 1935 to 1942, inclusive, in the sum of $485,928.75, against the Outhwaite Project referred to in subparagraph 3 of the description appearing in Paragraph IV herein.

(c) For the years 1936 to 1942, inclusive, in the sum of $559,912.63, against the Lakeview Terrace Project described in subparagraphs 4 to 10, inclusive, of Paragraph IV herein.

IX

The defendant, John J. Boyle, County Treasurer of Cuyahoga County, Ohio, is actively asserting that these taxes, together with the accumulated interest and penalties thereon, are proper and lawful and constitute liens against said lands and buildings. Said defendant, John J. Boyle, has continuously demanded of the plaintiff that the taxes, penalties, and interest, be paid, and unless enjoined by order of this court will continue to attempt to enforce collection of the alleged tax liens and will proceed to sell this property at tax sales for non-payment of said taxes, interest and penalties and, pursuant to Section 5703, Ohio General Code, will seek the appointment of a receiver to manage said property for the purpose of enforcing collection of the invalid taxes, interest and penalties—all to the plaintiffs's immediate, irreparable injury, loss and damage. The alleged [fol. 7] tax liens constitute an encumbrance and cloud on the plaintiffs' title and the threatened tax sales and proceeding to enforce collection will subject the plaintiffs to innumerable suits and will constitute a direct and irremediable interference with the normal control, administration, and disposition of said property.

X

Although said lands and improvements are not subject to taxation, the defendant, John A. Zangerle, has placed this property on the assessment rolls and on the tax duplicates for the current tax year and, unless restrained by order of this court, will continue to assess this property in the future. The defendants, Board of County Commissioners and City of Cleveland, unless restrained by order of this court will continue to levy taxes thereon, thus wrongfully encumbering the plaintiffs' title, subjecting the plaintiffs to innumerable suits and irremediably interfering with normal control, administration and disposition of said property.

XI

The laws of the State of Ohio relating to the taxation of real property, in particular Ohio General Code, Secs. 5328 and 5625-3, as interpreted by the defendants to apply to property owned by the United States and the Federal Public Housing Authority, contravene the Constitution of the United States.

Wherefore, plaintiff prays:

1. That a temporary injunction issue restraining the defendant John J. Boyle, from collecting or taking any action seeking the collection of taxes, interest and penalties upon or against said property and from taking any action leading to the sale of said property for non-payment of the aforesaid taxes, interest and penalties.

2. That a temporary injunction issue enjoining and restraining the defendants, John A. Zangerle, Board of County Commissioners, and City of Cleveland from assessing, levying, or attempting to assess or levy taxes against said property as long as it continues to be owned by the [fol. 8] Federal Public Housing Authority or the United States.

3. That the aforesaid taxes, interest and penalties levied and assessed against this property be declared void.

4. That upon final hearing the temporary injunction be made permanent.

5. For the costs of this action.

6. For such further relief as the court may deem necessary and proper.

Don C. Miller, United States Attorney, Frank E. Steel, Assistant United States Attorney. This. L. McKevitt Attorney, Department of Justice.

Duly sworn to by Don C. Miller. Jurat omitted in printing.

[fol. 9] [File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

[Title omitted]

MOTION FOR TEMPORARY INJUNCTION—Filed July 14, 1943

The plaintiffs in the above case, by Don C. Miller, United States Attorney, and Frank E. Steel, Assistant United States Attorney, move the court on the verified complaint to grant temporary injunctions against the defendants and each of them pending this suit and until further order of the court, conformable to prayers 1 and 2 of the complaint in this case filed.

Plaintiffs pray that Your Honor call to his assistance to hear and determine this motion two other judges in accordance with the provisions of Section 266 of the Judicial Code, 28 U. S. C. A. 380, in that an interlocutory injunction is sought on the basis of the unconstitutionality of a state law.

Plaintiffs further pray that the hearing on this motion be expedited and set down for hearing at the earliest practicable date. Dated this 14th day of July, 1943.

Don C. Miller, United States Attorney; Frank E. Steel, Assistant United States Attorney.

[fol. 10] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

[Title omitted]

ANSWER OF THE CITY OF CLEVELAND—Filed August 31, 1943

I

Now comes the City of Cleveland, and for its answer to the complaint filed herein, admits the allegations contained

II

For want of knowledge this answering defendant denies that the United States, through the Federal Emergency Administrator of Public Works, acquired title to the real estate described in Item IV of plaintiff's complaint, but admits that it is described on the tax-duplicates of Cuyahoga County, as set forth in Item IV.

III

For want of knowledge this answering defendant denies that titles vested in the United States in the manner and at the times set forth in Item V of plaintiff's complaint, but admits that said properties appear of record in the name of the United States, or an instrumentality thereof.

IV.

With respect to Item VI of plaintiff's complaint, this answering defendant admits the existence of Executive Order No. 7732, effective November 1, 1937, but for want of knowledge denies that all right, interest and title to said land was thereby transferred to the United States Housing Authority, now known as the Federal Public Housing Authority, and for want of knowledge denies that it has been and now is owned by the United States or its wholly-owned [fol. 11] instrumentality, the Federal Public Housing Authority. This answering defendant admits that the property has been used for a low cost housing development, and that in connection with this use there has been constructed on some of said lands certain buildings and structures; and admits that since January 1, 1940, the property has been leased for active management purposes to the Cleveland Metropolitan Housing Authority, and that said Cleveland Metropolitan Housing Authority is a state housing authority organized under and by virtue of the laws of the State of Ohio.

V

Respecting Item VII of plaintiff's complaint, defendant denies that the land, together with buildings, appurtenances and improvements thereon, since its acquisition by the United States, has been immune from state taxation under the Constitution of the United States; admits that under

Section 5 of the Act of September 1, 1937 (50 Stat. 890) 42 U. S. C. A. 1405 (e) the Congress of the United States attempted to declare that the property was exempt from taxation by any state, county, municipality or taxing authority, but this answering defendant avers that said Act of September 1, 1937, is illegal, invalid and contravenes the Constitution of the United States of America.

VI

Respecting Item VIII of plaintiff's complaint, this answering defendant denies the allegation that "said land and improvements are not subject to taxation and that taxes have been unlawfully assessed thereon." Defendant admits that taxes have been assessed for years 1935 to 1942, inclusive, but for want of knowledge denies that they have been assessed in the amounts set forth in Item VIII of plaintiff's complaint.

VII

Respecting Item IX of plaintiff's complaint, this answering defendant admits that John J. Boyle, as County Treasurer of Cuyahoga County, is actively asserting that these taxes, together with accumulated interest and penalties thereon, are proper and lawful, and constitute liens against said lands and buildings, and that he will attempt to collect the same. For want of knowledge this defendant [fol. 12] denies what means the said County Treasurer will resort to to enforce the collection of said taxes.

VIII

Respecting Item X of plaintiff's complaint, this answering defendant denies the allegation "that said lands and improvements are not subject to taxation," but admits that John A. Zangerle, as County Auditor of Cuyahoga County, Ohio, has placed this property on the assessment rolls and on the tax duplicates for the current tax year.

IX

This defendant denies that the laws of the State of Ohio relating to taxation of real property, and in particular sections 5328 and 5625-3, contravene the Constitution of the United States, as set forth in Item X of plaintiff's complaint.

X

This answering defendant says that if section 5 of the Act of September 1, 1937, and particularly that part of it known as 42 U. S. C. A: 1405 (e) is legal and constitutional, then this defendant says that it is not the intention of Paragraph e to exempt The Authority from the payment of special assessments and improvements which add to the value of the specific property and which are not levied or assessed as general taxes, and this answering defendant says that such special assessments are obligations that the Authority must pay even though they may be held exempt from the payment of general taxes.

XI

This defendant further says that under the laws of the State of Ohio specific provisions are made for the exempting of property of the United States from taxation when used for a public purpose, but this defendant avers that in using this land for the purpose of constructing housing facilities which are rented to individuals and in leasing said properties to the Cleveland Metropolitan Housing Authority, a State Housing Authority who in turn sublets it to individuals, it is under such circumstances not being used for a public purpose under the laws of the State of Ohio or under the Constitution and laws of the United [fol. 13] States, and plaintiff is not entitled to have said properties exempt from taxation.

XII

This answering defendant further avers that the Constitution of the United States does not contain an express provision exempting from taxation the property of the United States situated in various states, nor does it prohibit such taxation; neither does it delegate such power to the United States. Defendant says that by virtue of the Tenth Amendment to the Constitution of the United States, powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved by it to the states respectively or to the people. That, while the laws of the State of Ohio exempt property of the United States, used for a public purpose, from taxation, nevertheless by section 5570-1 of the General Code of Ohio,

as amended August 21, 1941, the State of Ohio has prescribed the procedure for claiming tax exemption and for placing the property of record on the exempt list, yet the plaintiff has failed and neglected to take any steps to secure exemption as required by the laws of the State of Ohio; that even if these properties should be exempt, the plaintiff has not exhausted its ordinary legal remedies and is not entitled to the extraordinary relief sought herein.

XIII

Defendant denies each and every allegation in plaintiff's complaint, not herein specifically denied, qualified or admitted to be true.

Wherefore, having fully answered, this defendant prays that plaintiff's complaint be dismissed and that it go hence without day and recover its costs herein.

Thomas A. Burke, Jr., Director of Law; Joseph F. Smith, Assistant Director of Law, Attorneys for Defendant, City of Cleveland.

[fol. 14] ACKNOWLEDGMENT OF SERVICE

A copy of the foregoing answer was served upon me this 31st of August, 1943.

Don C. Miller, U. S. District Attorney; by J. N. Curtis, Assistant District Attorney.

Duly sworn to by Joseph F. Smith. Jurat omitted in printing.

[fol. 15] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

[Title omitted]

ANSWER OF JOHN J. BOYLE, et al—Filed September 9, 1943

I. Now come defendants, John J. Boyle, County Treasurer of Cuyahoga County, Ohio, John A. Zangerle, Auditor of said County, and the Board of County Commissioners

of said County and admit the averments set forth in Paragraphs 1, 2, 3, 4, 5 and 6 of complaint filed herein.

II. These defendants deny the averment of Paragraph VII of the complaint that said lands and improvements so acquired by the United States are immune from state taxation by virtue of the provisions of the Constitution of the United States or of the terms of Sec. 5 of the Act of Congress of September 1, 1937.

III. These defendants admit that the said lands and improvements were placed upon the tax duplicate of said county and taxes assessed against the same for the years and in the amounts set forth in Paragraph VIII of the complaint, and defendants deny that said lands and improvements were unlawfully placed on the said duplicate and deny that said taxes were unlawfully assessed.

IV. Defendants admit that as averred in Paragraph 9 of the complaint said defendant County Treasurer asserts the lawfulness and validity of the lien of said taxes so assessed with the interest and penalties thereon, but defendants deny that they, or any of them, propose to or will attempt to enforce the lien of said taxes by means [fol. 16] other than by suit for that purpose authorized to be instituted against said Federal Public Housing Authority by the terms of Section 1405 of the Act of Congress of September 1, 1937 and Executive Order No. 9070 dated February 27, 1942.

V. Defendant John A. Zangerle, County Auditor, admits as averred in Paragraph 4 of the complaint that unless restrained and enjoined by this Court he will place the said property on the tax duplicate of said County for the current year and assess the same for taxes, and defendants the Board of County Commissioners admit that unless restrained by order of this Court it will continue to levy taxes against the lands on said tax list and duplicate as prepared by the said County Auditor. The defendants deny that such acts on their part would unlawfully encumber the plaintiff's lands or interfere with the use thereof.

VI. Defendants deny that the acts of defendants or any of them, in the complaint recited constitute an inter-

pretation or construction of the terms and provisions of Sections 5328 and 5625-3 of the General Code of Ohio so as to contravene the Constitution of the United States.

VII. By way of further defense, these defendants aver that by the terms and provisions of the Act of June 29, 1936 and the Act of September 1, 1937, the Authority, plaintiff herein, was authorized and required to enter into agreements with the political subdivision of the County of Cuyahoga authorized by law to levy taxes against the real property tax list and duplicate of said County, to pay to them respectively annual sums in an amount not in excess of that which would be payable as taxes thereupon if such property were not exempt therefrom, but said Authority has neglected and refused so to do, by reason whereof the said political subdivisions have been required to expend large sums of money derived from taxes levied against the other lands in said County for the payment of the cost of the governmental, educational utility and benevolent services and facilities rendered by said political subdivisions to many thousand inhabitants of the said projects con- [fol. 17] structed, owned and operated by said Authority.

VIII. Further answering, these defendants say that this Court lacks jurisdiction of the subject matter hereof, such suit being one to enjoin and restrain the assessment, levy and collection of a tax imposed pursuant to the laws of the State of Ohio, for any invasion of the rights of the plaintiff in respect thereto, a plain, speedy and efficient remedy is available in the Courts of such State.

Frank T. Cullitan, Prosecuting Attorney of Cuyahoga County, Ohio, and Ralph W. Edwards, Assistant Prosecuting Attorney, Attorneys for Defendants herein, Criminal Courts Building Cleveland, Ohio.

Duly sworn to by Ralph W. Edwards. Jurat omitted in printing.

[fol. 18] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

[Title omitted]

STIPULATION AS TO CERTAIN FACTS—Filed September 9, 1943

Subject to the right of any party to object to the materiality of any fact stated herein, it is hereby stipulated as follows:

1. Title to the property described in Paragraph IV of the complaint vested in the United States in the manner and on the dates set out in Paragraph V of said complaint.

2. Since completion of the project in 1937, the individual units have been rented to and occupied by individual families of low income. Prior to January 1, 1940, the project was administered by the Federal Public Housing Authority but since that date it has been leased by the Federal Public Housing Authority to the Cleveland Metropolitan Housing Authority under a lease which requires that the property be used only as a site for a low-rent housing project as measured by standards set by the parties.

3. Taxes for the years 1935 to 1943, inclusive, have been assessed against the property in the name of the United States of America and the total taxes and assessments together with interest and penalties thereon approximate the totals set out in Paragraph VIII of the complaint. The parties specifically reserve the right to set forth by separate stipulation the amounts of special assessments included in that total.

4. From September 1, 1937, to January 1, 1940, payments in the sum of $16,026.78 per year were made by the United States Housing Authority under agreements whereby this sum was distributed between the City of Cleveland, the [fol. 19] County of Cuyahoga and the Board of Education in lieu of taxes for services rendered. For the year 1940, 1941 and 1942 payments in the same yearly amount, $16,026.18 were made each year by the Cleveland Metropolitan Housing Authority under similar agreements. The agreements have been rescinded by the County.

5. The defendant, County Treasurer, intends to enforce the collection of the delinquent taxes appearing on the tax

duplicate against the property by suit to foreclose the claimed tax liens. The defendant, County Auditor, intends to continue to assess and the defendants, City of Cleveland and Board of County Commissioners, intend to continue to levy real property taxes against the property in the future.

6. The assessed value of this land before its acquisition by the United States approximated $ — while it is currently assessed for taxes at a valuation of $ —.

7. The right is reserved to any party to introduce further evidence or to submit further affidavits not inconsistent with the facts herein stipulated.

Don C. Miller, United States Attorney; Frank E. Steel, Asst. U. S. Attorney, Frank T. Cullitan, Pros. Atty. By Ralph W. Edwards, Asst. Prosecutor. Attorney for defendants, John T. Boyle, County Treasurer, John A. Zangerle, County Auditor and Board of County Commissioners of Cuyahoga County, Ohio. Thos. A. Burke, Jr., Director of Law. By Joseph F. Smith, Attorney for City of Cleveland, Asst. Dir. of Law.

[fol. 20] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Civil No. 21897

UNITED STATES OF AMERICA and FEDERAL PUBLIC HOUSING AUTHORITY, Plaintiffs,

vs.

JOHN J. BOYLE, County Treasurer of Cuyahoga County, Ohio; John A. Zangerle, County Auditor of Cuyahoga County, Ohio; Board of County Commissioners of Cuyahoga County, Ohio; and City of Cleveland, Defendants

MEMORANDUM OPINION—Filed November 12, 1943

Before Allen, Circuit Judge, and Jones and Freed, District Judges

ALLEN, Circuit Judge:

The full court agrees that it has jurisdiction of the parties and of the subject-matter of the litigation *Query* v. *United*

States, 316 U. S. 486. But since we do not unanimously agree that the real estate is being devoted to a public use, it seems advisable to give this question a more formal consideration than that embodied in the findings of fact and conclusions of law.

The real estate involved in this controversy was acquired by the United States through condemnation proceedings instituted by the Federal Emergency Administrator of Public Works, acting pursuant to the authority of Title II, ss 201, 202 and 203 of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 200, 201, 202, 40 U. S. C., ss 401, 402, 403. These and related sections of the statute were held unconstitutional by the Court of Appeals for the Sixth Circuit in *United States* v. *Certain Lands in City of Louisville*, 78 Fed. (2d) 684, and by a District Court in *United States* v. *Certain Lands in City of Detroit*, 12 Fed. Supp. 345, upon the ground that such a taking was not for a public use and that the Congress is not authorized to appropriate money to promote the general welfare of even a great number of residents of the community in which the project was situated. While a writ of certiorari was filed to the decision in *United* [fol. 21] *States* v. *Certain Lands in City of Louisville*, the case was dismissed upon motion by the Government prior to oral argument in the Supreme Court, for the reason that in forty-one of the slum-clearance projects existing throughout the Nation the necessary land had been secured by negotiation, and in eight other cases, while condemnation proceedings were resorted to, no question had been raised as to the legality of the Act. It therefore was concluded that the Louisville case — a practical matter had become moot. 130 A. L. R. 1069, 1072.

Thereafter the United States, first through the Federal Emergency Administrator of Public Works and later through the Federal Public Housing Authority, constructed on the land so acquired the buildings necessary for a low-cost housing slum-clearance project.

In 1937 the Congress enacted the so-called "United States Housing Act of 1937," 50 Stat. 888, 42 U. S. C., ss 1401-1430. This Act created a Government corporation to be known as the United States Housing Authority, which was to function as an instrumentality of the United States in lending financial assistance to state and local housing agencies for the purpose of improving public housing conditions. In addition, § 1404 (d) empowered the President to transfer to the Au-

thority any right, interest or title held by any department or agency of the Federal Government in any housing or slum-clearance projects constructed or in process of construction on the date of the enactment of the Act, and pursuant thereto the real estate in question was transferred to the Authority by executive order No. 7732, effective November 1, 1937. The property was thereafter leased to the Cleveland Metropolitan Housing Authority under the provisions of § 1412 (b) and (d).

The principal legal question in the case is whether property so acquired may, under the restrictions of the United States Constitution, be used by the United States for low-cost housing and slum-clearance. It is contended that the employment by the Federal Government of real estate for the purposes described does not constitute a public use, and hence does not fall within the powers of the Federal Government.

With reference to the constitutionality of the United States Housing Act of 1937, which is attacked here, the [fol. 22] question is an open one. The previous decisions in this circuit which rule upon a similar question apply only to the housing and slum-clearance provisions of the National Industrial Recovery Act, 40 U. S. C., § 401 et seq. Moreover, in *Helvering* v. *Davis*, 301 U. S. 619, 640, the Supreme Court squarely overruled the doctrine relied upon for those decisions, and held that Congress has the power to impose a tax and appropriate money for the General welfare. *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *United States* v. *Butler*, 297 U. S. 1, 65. Under these pronouncements the Court of Appeals for the Sixth Circuit, in *Bastian* v. *United States*, 118 Fed. (2d) 777, decided that a resettlement project established under the authority of the Emergency Relief Appropriation Act of April 8, 1935, c. 48, 49 Stat. 115, was valid. Substantially the same contentions as are urged against the constitutionality of the present projects were presented in that case and overruled.

Under the recent decisions of the Supreme Court, it is significant that the stated purpose of the Act under consideration is much broader than the purpose of the emergency housing sections of the National Industrial Recovery Act, 40 U. S. C., § 403 (a), which declared that the provisions in question were enacted "with a view to increasing

employment quickly (while reasonably securing any loans made by the United States) * * *". The purpose of the 1937 statute is announced in the body of the Act, as follows:

Title 42, U. S. C., § 1401.

> "It is hereby declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation."

It not only is no longer an open question that Congress has power to appropriate money to promote the general welfare, but the determination of the Congress that the projects are in furtherance of the general welfare is decisive, unless arbitrarily made and clearly wrong. *Helvering* v. *Davis*, supra, 640, 641. Here there is nothing to show that the legislative choice is clearly wrong. While it is true that in former periods of our history such projects might not have been necessary for the general welfare, it is also true, as stated in *Helvering* v. *Davis*, that "Needs that were [fol. 23] narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation." Despite the difference in character of the slum areas existing in different parts of the country, as was found by the National Commission on Law Observance and Enforcement in its First Report on the Causes of Crime, the delinquency areas in these cities "display similar characteristics poor housing conditions; shifting and decreasing populations; great poverty and dependence; a marked absence of the home-owning class; a largely foreign population of inferior social status; unwholesome types of recreation; inadequate open-air play facilities." On the other hand, it is a matter of widespread knowledge that slum-clearance is a direct remedy for the insanitary, unhealthful conditions that arise out of the crowding and filth of the slum areas. Where old tenements are torn down, and replaced by new, clean, healthful buildings, open to light and air, there is a sharp decline in disease and delinquency. In Liverpool one such slum-

clearance project regained 77% of the old population, and another 99%. Yet after a short period crime had decreased among these same residents to less than 25% of the former figure, tuberculosis dropped from 4 to 1.9 per thousand, and the death rate dropped from 50 to 27 per thousand. 14 American Enc. Social Science, 95.

The problem of eliminating the slum throughout the country is national in scope and it lies within a domain which the individual States cannot reach, and over which the Congress alone has power.

The individual States have long been held to have power to enter into such projects within their borders. *Green* v. *Frazier*, 253 U. S. 233. In such cases the power was upheld on the ground of public use; and we think the same considerations compel the conclusion here that a public use exists. The fact that private individuals receive direct benefit from these projects does not deprive the public of their use. The public, after all, is merely an aggregation of private individuals. Public Schools, public universities, public parks, and many similar governmental institutions and projects which offer definite public benefit extend peculiar benefit to those who have immediate access to them. Direct use by the general public is not essential. *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531. Nor does the use fail to be public upon the ground that the immediate enjoyment of it is limited to a small group or even to a single person. *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112, 161; *Mt.* [fol. 24] *Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, 32; *Rindge Co.* v. *County of Los Angeles*, 262. U. S. 700, 707.

We think that a project so closely connected with the public health, safety and morals of the citizens of the Nation as the abolition on a national scope of the slum, plainly constitutes a project of public use, and is authorized under the Constitution of the United States. *Oklahoma City* v. *Sanders*, 94 Fed. (2d) 323 (C. C. A. 10). Cf. *Housing Authority of City of Dallas* v. *Higginbotham*, 143 S. W. (2d) 79, 130 A. L. R. 1053.

For these reasons, as well as those stated in the findings of fact and conclusions of law, it follows that the injunction prayed for is allowed.

[fol. 25] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Civil No. 21897

UNITED STATES OF AMERICA and FEDERAL PUBLIC HOUSING AUTHORITY, Plaintiffs,

v.

JOHN J. BOYLE, County Treasurer of Cuyahoga County, Ohio; John A. Zangerle, County Auditor of Cuyahoga County, Ohio; Board of County Commissioners of Cuyahoga County, Ohio, and City of Cleveland, Defendants

DISSENTING OPINION—Filed November 12, 1943

JONES, J. (Dissenting):

I agree that property held by the United States, and employed by it in the execution of its constitutional powers and functions, may be held exempt from State taxation; but I think that in holding this property in the name of an instrumentality of the United States, for the use of special or selected classes or people, or specially selected groups, and with the intention to lease, and leasing it, to a State-created proprietary agency, is not such a governmental function or purpose as to permit its exemption from State, County or Municipal taxation. In such circumstances as presented here, I am of the opinion that the lands were not acquired and are not held for a governmental function or purpose within the right of constitutional sovereignty. I think title and use both are essential in testing the right to tax exemption of property held by the sovereign. If title only is the test, constitutional limitations are without meaning.

It will be noted that Mr. Justice Gray, in writing the opinion for the court in Van Brocklin vs. State of Tennessee, 117 U. S. 151 (relied upon so strongly by the Housing Authority), repeatedly and consistently refers to tax exemption of property of the United States used for governmental functions or purposes. In that case, the property was acquired and held by the United States to enforce and liqui-

date a tax lien, and this it seems to me was in furtherance of the governmental function of protecting and preserving its revenues. Thus, as I think, property held by the United States, or by an instrumentality of the Federal government, only may be exempt from taxation by a State, County or [fol. 26] City in which the property is situated, where the property is devoted to or used for a governmental function or purpose.

No matter how desirable slum clearance and low-cost housing may be, it is not in my opinion such a Federal function as to permit exemption of the property used therefor from State taxation. On the contrary, it consistently has been held that the power of the States to protect the lives, health and property of their citizens, and to preserve good order and public morals, is a power originally and always belonging to the States and not surrendered by them to the general government. Cooley, Principles of Constitutional Law. If the Federal government may acquire and hold property free from State taxation and devote it to any use or purpose not related to governmental functions, there is no limitation of Federal power over State sovereignty. Such right is not implicit in Federal sovereignty, nor is it express or to be implied in the provisions of the Federal Constitution. I think the property involved in this case is subject to the taxes assessed.

Considering the matter from another aspect, what has been done to impair State sovereignty, simply stated, is this: the Federal government has acquired this property and holds it through its agency, the Housing Authority, for the purpose of furnishing low-cost housing to special groups or classes of inhabitants. This certainly is a private use of the land. The State, County and City furnish benefits and services to these residents just as they furnish services, facilities and benefits to other residents. Thus to require the State to give services and protection to this property, and deprive it of its revenues to be used for such purposes, without making any substantial or adequate provision to compensate for such loss of revenues, seems to me to be contrary to all sense of Federal or Constitutional right,—a dangerous denial of State sovereignty.

[fol. 27] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

FINDINGS OF FACT AND CONCLUSSIONS OF LAW—Filed November 12, 1943

FINDINGS OF FACT

I

The plaintiff, United States of America, acquired the property involved in this proceeding upon the filing of declarations of taking in 1934 and 1935 on the specific dates and in the condemnation proceedings as set out in paragraph V of the complaint. By Executive Order 7732, effective November 1, 1937, all right, interest and title to said land was transfererd to the United States Housing Authority (now known as the Federal Public Housing Authority), a wholly owned government corporation created under the Act of September 1, 1937, 50 Stat. 888.

II

Following acquisition of title by the United States, there was constructed on this property by the plaintiffs the necessary buildings and structures in connection with its use as a low-cost housing development. Since completion of the project in 1937, the individual units have been rented to and occupied by individual families of low income.

III

Prior to January 1, 1940, the project was administered by the Federal Public Housing Authority but since that date it has been leased to the Cleveland Metropolitan Housing [fol. 28] Authority, a public housing agency created under the laws of Ohio, under a lease which requires that the property be used only as a site for a low-rent housing project, as measured by standards set by the parties.

IV

Taxes and assessments for the years 1935 to 1943, inclusive, have been assessed against the property in the name of

the United States of America and the total taxes and assessments appearing on the tax duplicates, together with interest and penalties, approximate the sum of $1,558,814.83.

V

From September 1, 1937, to January 1, 1940, payments in the sum of $16,026.78 per year were made by the United States Housing Authority under agreements whereby this sum was distributed between the City of Cleveland, the County of Cuyahoga and the Board of Education in lieu of taxes for services rendered, pursuant to the authority to make such payments set out in sec. 13 of the Act of September 1, 1937, 50 Stat. 888, 894. For the years 1940, 1941 and 1942, payments in the same yearly amount, $16,026.78 were made each year by the Cleveland Metropolitan Housing Authority under similar agreements. In 1943, the County of Cuyahoga rescinded its part in these agreements.

VI

The defendant, John J. Boyle, as County Treasurer of Cuyahoga County, is actively asserting the validity of the taxes so assessed and it is his intention to enforce their collection against the property by suit to foreclose the claimed tax lien. The defendant, John A. Zangerle, County Auditor of Cuyahoga County, the defendant, Board of County Commissioners of Cuyahoga County, and the defendant, City of Cleveland, are also actively asserting that this property is subject to taxation and it is their intention to continue to assess and levy real property taxes there against unless restrained by order of this Court.

CONCLUSIONS OF LAW

I

This Court has jurisdiction of the parties and of the subject matter.

[fols. 29-31] II

Property owned by the United States or by the Federal Public Housing Authority, formerly the United States Housing Authority, is not subject to taxation by the State of Ohio or any of its legal subdivisions. *Mayo et al.* v. *United States*, 319 U. S. 441.

III

The immunity of federally owned property extends to and includes an immunity from special assessments.

IV

The use of this property as a site for a low-cost housing project is a public use.

V

The taxes and assessments appearing of record against this property are null and void and, in the absence of congressional consent, said property will remain immune from taxation as long as it is owned by the United States or the Federal Public Housing Authority.

VI

The plaintiffs are entitled to a permanent injunction directing cancel-ation of the taxes and assessments and restraining the defendants from taking any action to collect or levy taxes against this property in the future.

Florence E. Allen, United States Circuit Judge.
E. B. Freed, United States District Judge.

[fol. 32] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Civil No. 21897

UNITED STATES OF AMERICA and FEDERAL PUBLIC HOUSING AUTHORITY, Plaintiffs,

v.

JOHN J. BOYLE, County Treasurer of Cuyahoga County, Ohio; John A. Zangerle, County Auditor of Cuyahoga County, Ohio; Board of County Commissioners of Cuyahoga County, Ohio, and City of Cleveland, Defendants

JUDGMENT—Filed November 19, 1943

This case having come on for a hearing on the plaintiffs' motion for a temporary injunction, before a Special

District Court of three Judges, pursuant to Sec. 266 of the Judicial Code, and the Court having heard the arguments of all parties, by their respective attorneys, and upon consideration of the pleadings and stipulation of the parties, and the parties having submitted the case for entry of a final order, it is hereby ordered, adjudged and decreed:

1. The property described hereafter, since the dates set out following the individual descriptions, has been and is now owned by the United States of America or by its wholly-owned instrumentality, the Federal Public Housing Authority, formerly the United States Housing Authority. Since the date of its acquisition, this property has been immune from any form of taxation or special assessment and, in the absence of congressional consent, said property cannot be subjected to any form of state taxation or special assessment as long as it continues to be owned by the United States of America or the Federal Public Housing Authority.

[fol. 33] 2. The aforesaid property is described on the tax duplicates of Cuyahoga County, Ohio, as follows:

I

Book 44, Item 532: "Original Lots 60 and 61, converse and other subdivisions. Between Cedar and Central Streets west line of East 28th to East 30th Streets."

Book 44, Item 533: "Original Lots 57, 58, 59, 60. Between Cedar and Central Streets and west line of 28th Street to a point 1102.45 feet west on Cedar." (Acquired September 10, 1934)

II

Book 44, Item 546: "Scovill Avenue to Case Court, west of East 55th Street to East 40th Street." (Acquired February 18, 1935)

III

Book 79, Item 444: "Block A. Division Street, original Lot 51 of 450.28 feet by 316.83 feet."

Book 79, Item 445: "Original Lot 51 on Division Street, Block B. 416.86 feet frontage on Division Street."

Book 79, Item 446: "Original Lot 51, Division Street, Block. F. frontage 428.23 feet."

Book 79, Item 447: "Original Lot 51, on Division Street, Block G, having a frontage of 608.05 feet."

Book 79, Item 453: "Original Lot 51, fronting on West 25th Street. Block C, frontage 136.57 feet."

Book 79, Item 454: "Original Lot 51, West 25th Street, Block D, frontage 444.25 feet on West 25th."

Book 79, Item 455: "Original Lot 51, West 25th Street, Block E, frontage 221.31 feet on West 25th Street." (Acquired April 16, 1935)

3. The taxes and assessments appearing of record against this property since its acquisition by the United States of America are null and void.

[fols. 34-37] 4. The defendants, John J. Boyle, County Treasurer of Cuyahoga County, and John A. Zangerle, County Auditor of Cuyahoga County, their successors and assigns, are hereby enjoined from taking any action to enforce the purported tax liens against this property by collection, sale or otherwise; and said defendants are hereby ordered and required to cancel said taxes of record and to remove this land from the tax rolls as long as it remains tax-exempt.

5. The plaintiffs shall recover their costs.

Entered this 19 day of Nov. 1943.

Florence E. Allen, Judge, United States Circuit Court of Appeals for the Sixth Circuit. ——— ———, Judge, United States District Court for the Northern District of Ohio. E. B. Freed, Judge, United States District Court for the Northern District of Ohio.

[fol. 38] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION BY DEFENDANT, CITY OF CLEVELAND, TO AMEND THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed November 20, 1943

Now comes the defendant, City of Cleveland, and moves the Court that the Court's findings of fact and conclusions of law be amended as follows:

1. By setting forth in its findings of fact a statement as to whether or not a substantial constitutional question was involved.

2. By stating in its conclusions of law whether or not any state statute was held unconstitutional.

Thomas A. Burke, Jr., Director of Law, by Joseph F. Smith, Assistant Director of Law, Attorneys for Defendant, City of Cleveland.

[fols. 39-43] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AMENDING FINDINGS OF FACT—Filed Jan. 18, 1944

The court, having considered the motion of the Defendant, City of Cleveland, to amend the court's findings of fact and conclusions of law, grants the first request of the motion and denies the second request of the motion.

It is, therefore, ordered that the findings of fact be amended by adding thereto: "VII—A substantial constitutional question was involved."

Florence E. Allen, United States Circuit Judge.
E. B. Freed, United States District Judge.

[fol. 44] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR BY DEFENDANT, CITY OF CLEVELAND. —Filed Feb. 9, 1944

The defendant, City of Cleveland, file the following Assignments of Error on which they will rely on their appeal to the Supreme Court of the United States from the judgment of this court entered the 19th day of November, 1943, The Court erred:

(1) In not granting the defendant, City of Cleveland's motion to dismiss the complaint.

(2) In perpetually enjoining the defendants from taking any action to collect or levy taxes against the property in question and in directing a cancellation of taxes and assessments heretofore levied on the property in question and holding the same to be null and void.

(3) In holding that real property acquired and owned by the United States of America, or its agency, the Federal Public Housing Authority, for the purpose of low cost housing and slum clearance and subleased by said Federal Public Housing Authority to the Cleveland Metropolitan Housing and thereafter sublet to numerous tenants for residence purposes, was devoted to a public use and was immune from taxation.

(4) In holding that such property was immune from taxation under the laws of the State of Ohio, and particularly in holding that it was immune from taxation without application being made to the State of Ohio in accordance with the laws of said State for the placing of said property on the exempt list.

(5) In holding that the officials of the State of Ohio and the defendant, City of Cleveland, should be restrained from levying and attempting to collect taxes, as required of them under the laws of the State of Ohio.

[fol. 45] (6) In its failure to hold that Section 5 of the Act of September 1, 1937, and particularly that part of it known as 42 U. S. C. A. 1405 (e), is illegal and unconstitutional.

(7) In its failure to distinguish between general taxes and special assessments under 42 U. S. C. A. 1405 (e).

(8) In its holding set forth in its Special Findings of Law and Fact as follows:

(a) "Property owned by the United States or by the Federal Public Housing Authority, formerly the United States Housing Authority, is not subject to taxation by the State of Ohio or any of its legal subdivisions. *Mayo et al.*, v. *United States*, 319 U. S. 441."

(b) "The immunity of federally owned property extends to and includes an immunity from special assessments."

(c) "The use of this property as a site for a low-cost housing project is a public use."

(d) "The taxes and assessments appearing of record against this property are null and void and, in the absence of congressional consent, said property will remain immune from taxation as long as it is owned by the United States or the Federal Public Housing Authority."

(e) "The plaintiffs are entitled to a permanent injunction directing cancellation of the taxes and assessments and restraining the defendants from taking any action to collect or levy taxes against this property in the future."

(9) In its failure to find that the Constitution of the United States does not grant to the Federal Government the right to acquire and hold real estate for the purpose of building thereon low-cost housing and that by reason thereof the acquisition and holding of land for such purpose is unconstitutional.

(10) In its failure to declare that Sections 5328 and 5625-3 of the General Code of Ohio are valid, and that

the property in question is subject to those sections and under sections of the Ohio laws relating to taxation, and that said sections do not contravene the Constitution of the United States.

[fol. 46] (11) In rendering final judgment for the plaintiffs when it should have been for the defendants.

(12) In overruling this defendant's motion for new trial.

Wherefore, the defendant, City of Cleveland, prays that said judgment be reversed and that a judgment be rendered in favor of the defendants, and that defendants have their costs of this appeal.

Thomas A. Burke, Jr., Director of Law; Joseph F. Smith, Assistant Director of Law, Of Counsel, 204 City Hall, 'Phone—Ch. 0970, Attorneys for City of Cleveland.

[fol. 47] [File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR OF JOHN J. BOYLE ET AL.—Filed February 11, 1944

County defendants-appellants filed the following assignments of error on which they will rely on their appeal to the Supreme Court of the United States from the judgment of this Court entered the 19th day of November, 1943:

The Court erred:

(1) In ruling that the real property described in the complaint, acquired and owned by the United States of America for the purpose of low cost housing and slum clearance, was immune from taxation pursuant to and in accordance with the laws of Ohio.

(2) In ruling that Ohio General Code Sections 5328 and 5625-3 providing for the taxation of all real property in the state, contravene the Constitution of the United States insofar as they relate to the taxation of

the real property described in the complaint and owned by the United States of America.

(3) In ruling that the taxes levied by the said county and city against the said real property while so owned by the United States of America, were null and void.

(4) In enjoining the county defendants from collecting the taxes heretofore levied and assessed against said real property of the United States of America, and from hereafter assessing and levying taxes against the same.

(5) In not dismissing the plaintiffs' complaint.

(6) In rendering final judgment for the plaintiffs when it should have been for the defendants.

Frank T. Cullitan, Prosecuting Attorney of Cuyahoga County, Ohio, and Ralph W. Edward, Assistant Prosecuting Attorney, Attorneys for Appellants-Defendants. Criminal Courts Building Cleveland Ohio.

[fol. 48] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL OF CITY OF CLEVELAND—February 9, 1944.

It appearing to the court that the defendant, City of Cleveland, has filed its petition for appeal to the Supreme Court of the United States, and has filed therein its Assignments of Error and also its statement as to the jurisdiction of the Supreme Court of the United States, as required by Rule 12 of the Supreme Court rules, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the decree in qustion.

It is hereby ordered by the Court that the appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the decree rendered in said cause, on the 19th day of November, 1943, and

that said defendant give a bond with good and sufficient security in the sum of two hundred fifty Dollars ($250.00), that if as Appellant shall prosecute its appeal to effect, and answer all damages and costs if they fail to make their appeal good.

Dated this 9th day of February, 1944.

Paul Jones, District Judge.

[fols. 49-56] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL OF JOHN J. BOYLE et al.—February 11, 1944

It appearing to the court that the Cuyahoga County defendants have filed their petition for appeal to the Supreme Court of the United States, and have filed therein their Assignments of Error and also their statement as to the jurisdiction of the Supreme Court of the United States, as required by Rule 12 of the Supreme Court rules, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the decree in question.

It is hereby ordered by the Court that the appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the decree rendered in said cause, on the 19th day of November, 1943, and that said defendants give a bond with good and sufficient security in the sum of two hundred fifty Dollars ($250.00), that they as Appellants shall prosecute its appeal to effect, and answer all damages and costs if they fail to make their appeal good.

Date this 11th day of February, 1944.

Paul Jones, District Judge.

[fol. 57] SUPREME COURT OF THE UNITED STATES

No. 68

[Title omitted]

STATEMENT OF POINTS OF CITY OF CLEVELAND AND DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED—Filed May 8, 1944

The points on which appellant intends to rely in this Court in this case are as follows:

(1) The Court erred in not granting the defendant, City of Cleveland's motion to dismiss the complaint.

(2) The Court erred in perpetually enjoining the defendants from taking any action to collect or levy taxes against the property in question and in directing a cancellation of taxes and assessments heretofore levied on the property in question and holding the same to be null and void.

(3) The Court erred in holding that real property acquired and owned by the United States of America, or its agency, the Federal Public Housing Authority, for the purpose of low cost housing and slum clearance and subleased by said Federal Public Housing Authority to the Cleveland Metropolitan Housing and thereafter sublet to numerous tenants for residence purposes, was devoted to a public use and was immune from taxation by the State of Ohio.

(4) The Court erred in holding that the officials of the State of Ohio and the defendant, City of Cleveland, should be restrained from levying and attempting to collect taxes, as required of them under the laws of the State of Ohio.

(5) The Court erred in its failure to hold that Section 5 of the Act of September 1, 1937, and particularly that part of it known as 42 U. S. C. A. 1405 (e), is illegal and unconstitutional.

[fol. 58] (6) The Court erred in its failure to distinguish between general taxes and special assessments under 42 U. S. C. A. 1405 (e).

(7) The Court erred in its holdings set forth in its Special Findings of Law and Fact as follows:

(a) "Property owned by the United States or by the Federal Public Housing Authority, formerly the United States Housing Authority, is not subject to taxation by the State of Ohio or any of its legal subdivisions. *Mayo et al.* v. *United States*, 319 U. S. 441."

(b) "The immunity of federally owned property extends to and includes an immunity from special assessments."

(c) "The use of this property as a site for a low-cost housing project is a public use."

(d) "The taxes and assessments appearing of record against this property are null and void and, in the absence of congressional consent, said property will remain immune from taxation as long as it is owned by the United States or the Federal Public Housing Authority."

(e) "The plaintiffs are entitled to a permanent injunction directing cancellation of the taxes and assessments and restraining the defendants from taking any action to collect or levy taxes against this property in the future."

(8) The Court erred in its failure to find that the Constitution of the United States does not grant to the Federal Government the right to acquire and hold real estate for the purpose of building thereon low-cost housing and that by reason thereof the acquisition and holding of land for such purpose is unconstitutional.

(9) The Court erred in rendering final judgment for the plaintiffs when it should have been for the defendants.

[fol. 59] Only the following portions of the record as filed in this Court need be printed by the Clerk for the hearing of the case:

1. Complaint and motion for temporary injunction.
2. Answer of defendant, City of Cleveland.
3. Answer of defendant, John J. Boyle, and other county officers.

4. Stipulation between counsel re: agreement as to certain facts.

5. Supplemental oral stipulation as to facts made at trial, which reads as follows:

'That neither the United States nor any instrumentality of the United States has made application to the State Tax Commission, or any other instrumentality of the State of Ohio, seeking to have the property in question exempted from taxation, and that no steps whatsoever have been taken to carry out the procedure outlined by the laws of the State of Ohio for having property placed on the exempt list.'

6. Final judgment entry of November 19, 1943.

7. Motion by defendant, City of Cleveland, to amend the Findings of Fact and Conclusions of Law (Filed Nov. 20, 1943).

8. Order of court amending Findings of Fact and Conclusions of Law.

9. Assignment of Errors.

10. Order allowing appeal.

11. Majority opinion and minority opinion of trial court.

12. Findings of Law and Fact by trial court.

Robert M. Morgan, Assistant Director of Law; Thomas A. Burke, Jr., Director of Law; Joseph F. Smith, Assistant Director of Law, 204 City Hall, Cleveland, Ohio, Attorneys for the City of Cleveland.

[fol. 60] Notice

We hereby acknowledge notice of the filing of the within Statement of Points and Designation of Portions of Record to be printed, together with a copy of the same, this 8th day of May, 1944.

Charles Fahy, Solicitor General, Attorneys for The United States of America and The Federal Public Housing Authority.

Notice

We hereby acknowledge notice of the filing of the within Statement of Points and Designation of Portions of Record

to be printed, together with a copy of the same, this — day of May, 1944.

Frank T. Cullitan, Prosecuting Attorney of Cuyahoga County, by Ralph W. Edwards, Assistant County Prosecutor, Attorneys for John J. Boyle, John A. Zangerle and Board of County Commissioners of Cuyahoga County, Ohio.

[fol. 61] IN THE SUPREME COURT OF THE UNITED STATES

No. 69

[Title omitted]

STATEMENT OF POINTS ON WHICH APPELLANTS JOHN J. BOYLE, ET AL., INTEND TO RELY AND PARTS OF RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed May 8, 1944

The appellants intend to rely upon the contentions that the specially constituted district court erred:

(1) In ruling that the real property described in the complaint, acquired and owned by the United States of America for the purpose of low cost housing and slum clearance, was immune from taxation pursuant to and in accordance with the laws of Ohio.

(2) In ruling that Ohio General Code Sections 5328 and 5625-3 providing for the taxation of all real property in the state, contravene the Constitution of the United States insofar as they relate to the taxation of the real property described in the complaint and owned by the United States of America.

(3) In ruling that the taxes levied by the said county and city against the said real property while so owned by the United States of America, were null and void.

(4) In enjoining the county appellants from collecting the taxes heretofore levied and assessed against said real property of the United States of America, and from hereafter assessing and levying taxes against the same.

(5) In not dismissing the appellees' complaint.

(6) In rendering final judgment for the appellees when it should have been for the appellants.

The appellants deem only the following portions of the record as filed to be necessary for the consideration of the contentions above enumerated:

[fol. 62] 1. Complaint and motion for temporary injunction.

2. Answer of defendant, City of Cleveland.

3. Answer of defendant, John J. Boyle, and other county offices.

4. Stipulation between counsel re: agreement as to certain facts.

5. Supplemental oral stipulation as to facts made at trial, which reads as follows:

> "That neither the United States nor any instrumentality of the United States has made application to the State Tax Commission, or any other instrumentality of the State of Ohio, seeking to have the property in question exempted from taxation, and that no steps whatsoever have been taken to carry out the procedure outlined by the laws of the State of Ohio for having property placed on the exempt list."

6. Final judgment entry of November 19, 1943.

7. Motion by defendant, City of Cleveland, to amend the Findings of Fact and Conclusions of Law (Filed Nov. 20, 1943.)

8. Order of court amending Findings of Fact and Conclusions of Law.

9. Assignment of Errors.

10. Order allowing appeal.

11. Majority opinion and minority opinion of trial court.

12. Findings of Law and Fact by trial court.

Frank T. Cullitan, Prosecuting Attorney of Cuyahoga County, Ohio, and Ralph W. Edwards, Assistant Prosecuting Attorney, Attorneys for Appellants, Criminal Courts Bldg., Cleveland, Ohio.

RWE-sw
5-6-44

[fol. 63] NOTICE

We hereby acknowledge notice of the filing of the within Statement of Points and Designation of Portions of Record

to be printed, together with a copy of the same, this 8th day of May, 1944.

Charles Fahy, Solicitor General, Attorneys for the United States of America and The Federal Public Housing Authority.

NOTICE

We hereby acknowledge notice of the filing of the within Statement of Points and Designation of Portions of Record to be printed, together with a copy of the same, this 6th day of May, 1944.

Thomas A. Burke, Director of Law for City of Cleveland, by Joseph F. Smith, Assistant City Law Director, Attorneys for City of Cleveland.

[fol. 63a] [File endorsement omitted.]

[fol. 64] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

Nos. 68 and 69

[Title omitted]

ORDER POSTPONING FURTHER CONSIDERATION OF JURISDICTION—May 22, 1944

The statements of jurisdiction in these cases having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the cases on the merits.

Counsel are requested to discuss in their briefs and on oral argument the questions (1) whether sec. 266 of the Judicial Code is properly applicable to these cases so as to give this Court jurisdiction of the appeals (compare, e. g., Ex parte Public National Bank, 278 U. S. 96, and Rorick v. Commissioners, 307 U. S. 208, with Spielman Motor Sales Co. v. Dodge, 295 U. S. 89); and (2) whether the land in controversy would be taxable even if the Federal Housing Act of 1937 were unconstitutional.

May 22, 1944.

Endorsed on Cover: File No. 48,422, 48,423. D. C. U. S., Northern Ohio. Term No. 68. The City of Cleveland, Appellant, vs. The United States of America and Federal Public Housing Authority. Term No. 69. John J. Boyle, County Treasurer of Cuyahoga County, John A. Zangerle, County Auditor of Cuyahoga County, Board of County Commissioners of Cuyahoga County, Ohio, Appellants, vs. The United States of America and Federal Public Housing Authority. Filed April 24, 1944. Term No. 68, O. T. 1944, 69 O. T. 1944.

(3147)

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 629 68

THE CITY OF CLEVELAND,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

STATEMENT AS TO JURISDICTION.

THOMAS A. BURKE, JR.,
Director of Law;
JOSEPH F. SMITH,
Assistant Director of Law,
Counsel for Appellant.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Civil No. 21897

UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY,

Plaintiffs,

vs.

JOHN J. BOYLE, COUNTY TREASURER OF CUYAHOGA COUNTY, OHIO; JOHN A. ZANGERLE, COUNTY AUDITOR OF CUYAHOGA COUNTY, OHIO; BOARD OF COUNTY COMMISSIONERS OF CUYAHOGA COUNTY, OHIO, AND CITY OF CLEVELAND,

Defendants.

JURISDICTIONAL STATEMENT SUBMITTED BY DEFENDANT, CITY OF CLEVELAND.

The defendant-appellant, City of Cleveland, having presented this day their petition for appeal, now file this their statement on the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final order, judgment or decree in question and should exercise such jurisdiction in this case.

A. The Statutory Provision Believed to Sustain the Jurisdiction.

This appeal is prosecuted from a final order, judgment or decree which permanently restrains the defendants, tax assessing and tax levying officials of Cuyahoga County and the defendant, the City of Cleveland, in the State of Ohio, from taking any action to assess, levy, or collect taxes on certain lands owned by the plaintiffs in said City, as provided and required by the laws of Ohio, and the pleadings in the case, particularly the complaint of the plaintiffs allege that Sections 5328 and 5625-3 of the General Code of Ohio and proceedings thereunder contravene the Constitution of the United States.

The final judgment here appealed from was entered in the District Court of the United States for the Northern District of Ohio, Eastern Division, on November 19, 1943 by a statutory court consisting of one circuit and two district judges specially convoked under and by virtue of the provisions of Section 266 (as amended) of the Judicial Code (28 U. S. C. A. 380).

It is our contention that said section authorizes a direct appeal from the District Court to the Supreme Court of the United States, and particularly in the following exact language found at the end of the section:

> "and a direct appeal to the Supreme Court may be taken from the final decree granting or denying a permanent injunction in such a suit."

The above mentioned section provides that a three judge court be convened to hear either an application for an interlocutory injunction, or to hear the case on its merits when an order is sought "restraining the enforcement, operation or execution of any statute of the state by restraining the

action of any officer of such state in the enforcement or execution of such statute, * * *."

B. The State Statutes Which Are Involved.

The plaintiffs' complaint set forth that the lands and improvements of the United States of America described therein were assessed for taxation by the defendants in pursuance of the statutes of the State of Ohio, and that those statutes and particularly Ohio General Code Sections 5328 and 5625-3 contravene the Constitution of the United States when applied to property owned by the United States and the Federal Public Housing Authority.

Ohio General Code Section 5328 provides in substance as follows:

> "All real property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom. * * * All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property as prescribed in this title." (Throckmorton's One Volume Ohio Code. In 1940 Edition this section is found at Page 6 of Part Second.)

Ohio General Code Section 5625-3 provides in substance as follows:

> "The taxing authority of each subdivision is hereby authorized to levy taxes annually, subject to the limitations and restrictions of this act, on the real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and the acquisition or construction of permanent improvements. * * * All taxes levied on property shall be extended on the tax duplicate by the county auditor of the county in which the property is located, and shall be collected by the county treasurer of such county in the same manner and under the same laws, rules and regulations as are prescribed for the

assessment and collection of county taxes. * * * "
(Throckmorton's One Volume Ohio Code. In 1940 Edition this section is found at Page 175 of Part Second.)

In view of the fact that the action seeks to restrain an officer from carrying out the execution of the statutes of the State of Ohio and alleges the unconstitutionality of certain laws of the State of Ohio, we have exactly the situation that is outlined in 28 U. S. C. A., Section 380. We might add to this that the court in its Separate Findings of Law and Fact made a definite finding to the effect that "a substantial constitutional question was involved."

C. The Date of the Judgment or Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Is Presented.

The final order, judgment or decree here sought to be reviewed was entered and spread of record on November 19, 1943. On January 18, 1944 a motion was granted allowing a request by this defendant for an amendment to the Findings of Law and Fact, and on January 18, 1944 the defendant, City of Cleveland's motion for new trial was overruled.

This petition for appeal herein was presented and filed on the 9th day of February, 1944.

D. The Statement Showing That the Nature of the Case and of the Rulings of the Court Was Such as to Bring the Case within the Jurisdictional Provisions Relied on.

The plaintiffs have acquired by condemnation the lands involved in this suit, and the same were acquired for the purposes of establishing low-cost housing. The question involved herein arises out of the ownership of lands that were acquired by the United States of America by con-

demnation under the program for National Recovery, and does not involve property acquired for war housing or for the housing of war workers. The complaint alleges that the taxing officials and authorities of Cuyahoga County, Ohio and of the City of Cleveland have levied general taxes and special assessments against certain properties held in the name of the United States of America and on which the Federal Public Housing Authority has erected low-cost dwelling units. These units have been leased out to the Cleveland Metropolitan Housing, a State of Ohio Authority, and the latter has sublet the numerous dwelling units therein to individual tenants for residential purposes. The complaint alleges that certain officials of the Taxing Authority of the State of Ohio are attempting to collect taxes and assessments levied on said properties, and allege that the taxation laws of the State of Ohio, particularly Sections 5328 and 5625-3 of the General Code contravene the Constitution of the United States, and the complaint seeks to have the Taxing Authority and the respective officers restrained from collecting the taxes heretofore assessed and to restrain the Authority and officers from further levying taxes against these properties.

The complaint sought an interlocutory order and permanent injunction, but by agreement of parties the case was submitted on its merits at an early date without the granting of the interlocutory order. The case came on for hearing before a three judge court, as set up in 28 U. S. C. A., Section 380.

The court overruled motions to dismiss the complaint, granted a permanent injunction finding that a substantial constitutional question was involved, made a declaration that the taxes and assessments heretofore levied were null and void, and all notwithstanding the statutes of the State of Ohio requiring the authorities and officials involved to levy

and collect taxes except on such property as has been exempted and, further, notwithstanding the fact that no official of the plaintiffs made application to have said properties exempted, as required under the laws of the State of Ohio.

The answer of the defendant, City of Cleveland, alleges that the Act of September 1, 1937, and particularly that portion of it known as 42 U. S. C. A., 1405 (e), is illegal, invalid and contravenes the Constitution of the United States, and avers that the power to establish low-cost housing is not delegated to the Congress of the United States by the Constitution, and by virtue of the Tenth Amendment to the Constitution it is alleged that since the power is not specifically delegated, such powers are reserved to the states respectively and to the people. This raises another substantial constitutional question which by virtue of U. S. C. A., Title 28, Section 380a is a problem to be decided by a three judge court and provides that "appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character."

This appeal is prosecuted from the final order of the three judge court allowing a permanent injunction against collecting prior taxes or assessing future taxes.

E. Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Sustained.

The order entered herein restrains Tax Levying Authorities and Tax Collecting Authorities from performing duties required of them under the laws of the State of Ohio. It must be concluded that this is upon the grounds that such laws of Ohio contravene the Constitution of the United States. Such action affects the revenues available to the State and its political subdivisions for the operation of the governmental functions and duties thrust upon them by

such housing developments. It requires the State or its political subdivisions to proceed with improvements such as the laying of water mains, pavements, sidewalks, establishing roads and building bridges, without being able to tax large areas of lands that are now devoted by the Government to residential purposes, and without giving to the taxing subdivision the power to assess such property for special benefits conferred upon it by such improvements. It compels the State to furnish schools for the children of people residing in such projects without any contribution or support from the property wherein they live.

A substantial constitutional question is raised by this defendant's answer wherein it is claimed that the power to provide low-cost housing is not within the powers delegated to Congress by the Constitution of the United States. We contend that the Government of the United States has no power to acquire, and particularly to acquire, by condemnation proceedings under eminent domain, private property for low-cost housing purposes. Such a decision has been made by the United States Circuit Court of Appeals for this the Sixth District. The case of *United States* v. *Certain Lands in the City of Louisville*, 78 Federal Second, 684.

F. Cases Believed to Sustain the Jurisdiction.

We believe that this case comes squarely within the recent decision of *Query, etc.*, v. *United States, et al.*, 316 U. S. 486, wherein in a suit to restrain the enforcement of a state tax on the purchase and sale of goods at Army Post Exchanges on the ground that such Exchanges are federal instrumentalities and are immune from state taxes, and state taxes as applied to them were unconstitutional, it was held:

> "An appeal from a decree of injunction granted by a three-judge District Court under Jud. Code Section 266, lies directly to this Court, not to the Circuit Court of Appeals."

G. Statement Respecting Opinions.

The court below made certain Findings of Fact and Conclusions of Law, later amended upon motion, and delivered both a majority and a dissenting opinion. Copies of the Amended Findings of Fact and Conclusions of Law and of these opinions are attached hereto as Appendices "A", "B" and "C".

Respectfully submitted,

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Director of Law;
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APPENDIX "A".

Filed: C. B. Watkins, Clerk. U. S. District Court NDO. Nov. 12 1943. 3:55 P.M.

Civil No. 21897

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

UNITED STATES OF AMERICA and FEDERAL PUBLIC HOUSING AUTHORITY, *Plaintiffs*,

v.

JOHN J. BOYLE, County Treasurer of Cuyahoga County, Ohio; JOHN A. ZANGERLE, County Auditor of Cuyahoga County, Ohio; BOARD OF COUNTY COMMISSIONERS OF CUYAHOGA COUNTY, OHIO, and CITY OF CLEVELAND, *Defendants*.

Decided ——, 1943.

Before Allen, Circuit Judge, and Jones and Freed, District Judges.

ALLEN, Circuit Judge:

The full court agrees that it has jurisdiction of the parties and of the subject-matter of the litigation. *Query* v. *United States*, 316 U. S. 486. But since we do not unanimously agree that the real estate is being devoted to a public use, it seems advisable to give this question a more formal consideration than that embodied in the findings of fact and conclusions of law.

The real estate involved in this controversy was acquired by the United States through condemnation proceedings instituted by the Federal Emergency Administrator of Public Works, acting pursuant to the authority of Title II, §§ 201, 202 and 203 of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 200, 201, 202, 40 U. S. C., §§ 401, 402, 403. These and related sections of the statute were held unconstitutional by the Court of Appeals for the Sixth Circuit in *United States* v. *Certain Lands in City of Louisville*, 78 Fed. (2d) 684, and by a

District Court in *United States* v. *Certain Lands in City of Detroit*, 12 Fed. Supp. 345, upon the ground that such a taking was not for a public use and that the Congress is not authorized to appropriate money to promote the general welfare of even a great number of residents of the community in which the project was situated. While a writ of certiorari was filed to the decision in *United States* v. *Certain Lands in City of Louisville*, the case was dismissed upon motion by the Government prior to oral argument in the Supreme Court, for the reason that in forty-one of the slum-clearance projects existing throughout the Nation the necessary land had been secured by negotiation, and in eight other cases, while condemnation proceedings were resorted to, no question had been raised as to the legality of the Act. It therefore was concluded that the Louisville case — a practical matter had become moot. 130 A. L. R. 1069, 1072.

Thereafter the United States, first through the Federal Emergency Administrator of Public Works and later through the Federal Public Housing Authority, constructed on the land so acquired the buildings necessary for a low-cost housing slum-clearance project.

In 1937 the Congress enacted the so-called "United States Housing Act of 1937," 50 Stat. 888, 42 U. S. C., §§ 1401-1430. This Act created a Government corporation to be known as the United States Housing Authority, which was to function as an instrumentality of the United States in lending financial assistance to state and local housing agencies for the purpose of improving public housing conditions. In addition, § 1404 (d) empowered the President to transfer to the Authority any right, interest or title held by any department or agency of the Federal Government in any housing of slum-clearance projects constructed or in process of construction on the date of the enactment of the Act, and pursuant thereto the real estate in question was transferred to the Authority by executive order No. 7732, effective November 1, 1937. The property was thereafter leased to the Cleveland Metropolitan Housing Authority under the provisions of § 1412 (b) and (d).

The principal legal question in the case is whether property so acquired may, under the restrictions of the United

States Constitution, be used by the United States for low-cost housing and slum-clearance. It is contended that the employment by the Federal Government of real estate for the purposes described does not constitute a public use, and hence does not fall within the powers of the Federal Government.

With reference to the constitutionality of the United States Housing Act of 1937, which is attacked here, the question is an open one. The previous decisions in this circuit which rule upon a similar question apply only to the housing and slum-clearance provisions of the National Industrial Recovery Act, 40 U. S. C., § 401 et seq. Moreover, in *Helvering* v. *Davis*, 301 U. S. 619, 640, the Supreme Court squarely overruled the doctrine relied upon for those decisions, and held that Congress has the power to impose a tax and appropriate money for the General welfare. *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *United States* v. *Butler*, 297 U. S. 1, 65. Under these pronouncements the Court of Appeals for the Sixth Circuit, in *Bastian* v. *United States*, 118 Fed. (2d) 777, decided that a resettlement project established under the authority of the Emergency Relief Appropriation Act of April 8, 1935, c. 48, 49 Stat. 115, was valid. Substantially the same contentions as are urged against the constitutionality of the present projects were presented in that case and overruled.

Under the recent decisions of the Supreme Court, it is significant that the stated purpose of the Act under consideration is much broader than the purpose of the emergency housing sections of the National Industrial Recovery Act, 40 U. S. C. § 403 (a), which declared that the provisions in question were enacted "with a view to increasing employment quickly (while reasonably securing any loans made by the United States) * * *." The purpose of the 1937 statute is announced in the body of the Act, as follows:

Title 42 U. S. C., § 1401.

"It is hereby declared to be the policy of the United States to promote the general welfare of the Nation

by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation."

It not only is no longer an open question that Congress has power to appropriate money to promote the general welfare, but the determination of the Congress that the projects are in furtherance of the general welfare is decisive, unless arbitrarily made and clearly wrong. *Helvering* v. *Davis*, *supra*, 640, 641. Here there is nothing to show that the legislative choice is clearly wrong. While it is true that in former periods of our history such projects might not have been necessary for the general welfare, it is also true, as stated in *Helvering* v. *Davis*, that "Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation." Despite the difference in character of the slum areas existing in different parts of the country, as was found by the National Commission on Law Observance and Enforcement in its First Report on the Causes of Crime, the delinquency areas in these cities "display similar characteristics poor housing conditions; shifting and decreasing populations; great poverty and dependence; a marked absence of the home-owning class; a largely foreign population of inferior social status; unwholesome types of recreation; inadequate open-air play facilities." On the other hand, it is a matter of widespread knowledge that slum-clearance is a direct remedy for the insanitary, unhealthful conditions that arise out of the crowding and filth of the slum areas. Where old tenements are torn down, and replaced by new, clean, healthful buildings, open to light and air, there is a sharp decline in disease and delinquency. In Liverpool one such slum-clearance project regained 77% of the old population, and another 99%. Yet after a short period crime had decreased among these same residents to

less than 25% of the former figure, tuberculosis dropped from 4 to 1.9 per thousand, and the death rate dropped from 50 to 27 per thousand. 14 American Enc. Social Science, 95.

The problem of eliminating the slum throughout the country is national in scope and it lies within a domain which the individual States cannot reach, and over which the Congress alone has power.

The individual States have long been held to have power to enter into such projects within their borders. *Green* v. *Frazier*, 253 U. S. 233. In such cases the power was upheld on the ground of public use, and we think the same considerations compel the conclusion here that a public use exists. The fact that private individuals receive direct benefit from these projects does not deprive the public of their use. The public, after all, is merely an aggregation of private individuals. Public Schools, public universities, public parks, and many similar governmental institutions and projects which offer definite public benefit extend peculiar benefit to those who have immediate access to them. Direct use by the general public is not essential. *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531. Nor does the use fail to be public upon the ground that the immediate enjoyment of it is limited to a small group or even to a single person. *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112, 161; *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, 32; *Rindge Co.* v. *County of Los Angeles*, 262 U. S. 700, 707.

We think that a project so closely connected with the public health, safety and morals of the citizens of the Nation as the abolition on a national scope of the slum, plainly constitutes a project of public use, and is authorized under the Constitution of the United States. *Oklahoma City* v. *Sanders*, 94 Fed. (2d) 323 (C. C. A. 10). Cf. *Housing Authority of City of Dallas* v. *Higginbotham*, 143 S. W. (2d) 79, 130 A. L. R. 1053.

For these reasons, as well as those stated in the findings of fact and conclusions of law, it follows that the injunction prayed for is allowed.

APPENDIX "B".

Filed. C. B. Watkins, Clerk. U. S. District Court NDO. Nov. 12, 1943, 3:55 PM.

Civil No. 21897

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

UNITED STATES OF AMERICA and FEDERAL PUBLIC HOUSING AUTHORITY, *Plaintiffs*,

v.

JOHN J. BOYLE, County Treasurer of Cuyahoga County, Ohio; JOHN A. ZANGERLE, County Auditor of Cuyahoga County, Ohio; BOARD OF COUNTY COMMISSIONERS OF CUYAHOGA COUNTY, OHIO, and CITY OF CLEVELAND, *Defendants*.

JONES, J. (Dissenting):

I agree that property held by the United States, and employed by it in the execution of its constitutional powers and functions, may be held exempt from State taxation; but I think that in holding this property in the name of an instrumentality of the United States, for the use of special or selected classes or people, or specially selected groups, and with the intention to lease, and leasing it to a State-created proprietary agency, is not such a governmental function or purpose as to permit its exemption from State, County or Municipal taxation. In such circumstances as presented here, I am of the opinion that the lands were not acquired and are not held for a governmental function or purpose within the right of constitutional sovereignty. I think title and use both are essential in testing the right to tax exemption of property held by the sovereign. If title only is the test, constitutional limitations are without meaning.

It will be noted that Mr. Justice Gray, in writing the opinion for the court in Van Broklin vs. State of Tennessee, 117 U. S. 151 (relied upon so strongly by the Housing

Authority), repeatedly and consistently refers to tax exemption of property of the United States used for governmental functions or purposes. In that case, the property was acquired and held by the United States to enforce and liquidate a tax lien, and this it seems to me was in furtherance of the governmental function of protecting and preserving its revenues. Thus, as I think, property held by the United States, or by an instrumentality of the Federal government, only may be exempt from taxation by a State, County or City in which the property is situated, where the property is devoted to or used for a governmental function or purpose.

No matter how desirable slum clearance and low-cost housing may be, it is not in my opinion such a Federal function as to permit exemption of the property used therefor from State taxation. On the contrary, it consistently has been held that the power of the States to protect the lives, health and property of their citizens, and to preserve good order and public morals, is a power originally and always belonging to the State and not surrendered by them to the general government. Cooley, Principles of Constitutional Law. If the Federal government may acquire and hold property free from State taxation and devote it to any use or purpose not related to governmental functions, there is no limitation of Federal power over State sovereignty. Such right is not implicit in Federal sovereignty, nor is it express or to be implied in the provisions of the Federal Constitution. I think the property involved in this case is subject to the taxes assessed.

Considering the matter from another aspect, what has been done to impair State sovereignty, simply stated, is this: the Federal government has acquired this property and holds it through its agency, the Housing Authority, for the purpose of furnishing low-cost housing to special groups or classes of inhabitants. This certainly is a private use of the land. The State, County and City furnish benefits and services to these residents just as they furnish services, facilities and benefits to other residents. Thus to require the State to give services and protection to this property, and deprive it of its revenues to be used for such purposes,

without making any substantial or adequate provision to compensate for such loss of revenues, seems to me to be contrary to all sense of Federal or Constitutional right,—a dangerous denial of State sovereignty.

APPENDIX "C".

Filed. C. B. Watkins, Clerk. U. S. District Court NDO. Nov. 12, 1943, 3:55 PM.

Civil No. 21897

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

UNITED STATES OF AMERICA and FEDERAL PUBLIC HOUSING AUTHORITY, *Plaintiffs*,

vs.

JOHN J. BOYLE, County Treasurer of Cuyahoga County, Ohio; JOHN A. ZANGERLE, County Auditor of Cuyahoga County, Ohio; BOARD OF COUNTY COMMISSIONERS OF CUYAHOGA COUNTY, OHIO, and CITY OF CLEVELAND, *Defendants*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

I.

The plaintiff, United States of America, acquired the property involved in this proceeding upon the filing of declarations of taking in 1934 and 1935 on the specific dates and in the condemnation proceedings as set out in paragraph V of the complaint. By Executive Order 7732, effective November 1, 1937, all right, interest and title to said land was transferred to the United States Housing Authority (now known as the Federal Public Housing Authority), a wholly owned government corporation created under the Act of September 1, 1937, 50 Stat. 888.

II.

Following acquisition of title by the United States, there was constructed on this property by the plaintiff the necessary buildings and structures in connection with its use as a low-cost housing development. Since completion of the project in 1937, the individual units have been rented to and occupied by individual families of low income.

III.

Prior to January 1, 1940, the project was administered by the Federal Public Housing Authority but since that date it has been leased to the Cleveland Metropolitan Housing Authority, a public housing agency created under the laws of Ohio, under a lease which requires that the property be used only as a site for a low-rent housing project, as measured by standards set by the parties.

IV.

Taxes and assessments for the years 1935 to 1943, inclusive, have been assessed against the property in the name of the United States of America and the total taxes and assessments appearing on the tax duplicates, together with interest and penalties, approximate the sum of $1,558,814.83.

V.

From September 1, 1937 to January 1, 1940, payments in the sum of $16,026.78 per year were made by the United States Housing Authority under agreements whereby this sum was distributed between the City of Cleveland, the County of Cuyahoga and the Board of Education in lieu of taxes for services rendered, pursuant to the authority to make such payments set out in Sec. 13 of the Act of September 1, 1937, 50 Stat. 888, 894. For the years 1940, 1941 and 1942, payments in the same yearly amount, $16,026.78 were made each year by the Cleveland Metropolitan Housing Authority under similar agreements. In 1943, the County of Cuyahoga rescinded its part in these agreements.

VI.

The defendant, John J. Boyle, as County Treasurer of Cuyahoga County, is actively asserting the validity of the taxes so assessed and it is his intention to enforce their collection against the property by suit to foreclose the claimed tax lien. The defendant, John A. Zangerle, County Auditor of Cuyahoga County, the defendant, Board of County Commissioners of Cuyahoga County, and the defendant, City of Cleveland, are also actively asserting that this property is subject to taxation and it is their intention to continue to assess and levy real property taxes there against unless restrained by order of this Court.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the parties and of the subject matter.

II.

Property owned by the United States or by the Federal Public Housing Authority, formerly the United States Housing Authority, is not subject to taxation by the State of Ohio or any of its legal subdivisions. *Mayo et al.* v. *United States*, 319 U. S. 441.

III.

The immunity of federally owned property extends to and includes an immunity from special assessments.

IV.

The use of this property as a site for a low-cost housing project is a public use.

V.

The taxes and assessments appearing of record against this property are null and void and, in the absence of congressional consent, said property will remain immune from

taxation as long as it is owned by the United States or the Federal Public Housing Authority.

VI.

The plaintiffs are entitled to a permanent injunction directing cancelation of the taxes and assessments and restraining the defendants from taking any action to collect or levy taxes against this property in the future.

FLORENCE E. ALLEN,
United States Circuit Judge.
E. B. FREED,
United States District Judge.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 930

JOHN J. BOYLE, County Treasurer of Cuyahoga County; JOHN A. ZANGERLE, County Auditor of Cuyahoga County; BOARD OF COUNTY COMMISSIONERS OF CUYAHOGA COUNTY, OHIO,

Appellants,

vs.

THE UNITED STATES OF AMERICA and FEDERAL PUBLIC HOUSING AUTHORITY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

STATEMENT AS TO JURISDICTION.

Frank T. Cullitan,
Prosecuting Attorney,
Cuyahoga County;

Ralph W. Edwards,
Assistant Prosecuting Attorney,
Cuyahoga County,
Counsel for Appellants.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Civil No. 21897

Filed: C. B. Watkins, Clerk U. S. District Court NDO, Feb. 11, 1944, 11:02 A. M.

UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY,

Plaintiffs-Appellees,

vs.

JOHN J. BOYLE, COUNTY TREASURER OF CUYAHOGA COUNTY, OHIO; JOHN A. ZANGERLE, COUNTY AUDITOR OF CUYAHOGA COUNTY, OHIO; BOARD OF COUNTY COMMISSIONERS OF CUYAHOGA COUNTY, OHIO, AND CITY OF CLEVELAND,

Defendants-Appellants.

JURISDICTIONAL STATEMENT

The defendants-appellants having presented, this day, their petition for appeal, now file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review

the final judgment in question and should exercise jurisdiction in this case.

A. The statutory provision believed to sustain the jurisdiction.

This appeal is prosecuted from a final order, judgment or decree which permanently restrains the defendants, tax assessing and tax levying officials of Cuyahoga County and the City of Cleveland, in the State of Ohio, from taking any action to assess, levy, or collect taxes on certain lands owned by the plaintiffs in said city, as provided and required by the laws of Ohio known as General Code Sections 5328 and 5625-3, on the grounds that these statutes and proceedings thereunder contravene the Constitution of the United States.

The final judgment here appealed from was entered in the District Court of the United States for the Northern District of Ohio on November 19th, 1943, by a statutory court consisting of one circuit and two district Judges especially convoked under and by virtue of the provisions of Section 266 (amended) of the Judicial Code (28 U. S. C. A. 380). The said statute concludes as follows:

> "and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

It is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question by virtue of the express provisions last above set forth.

B. The State Statutes and administrative order involved.

The plaintiffs' complaint sets forth that the lands and improvements of the United States of America described therein were assessed for taxation by the county defendants

in pursuance of the Statutes of Ohio known as General Code Section 5328 providing therefor and requiring that all lands in the State shall be subject to taxation, except such as shall have been exempted therefrom pursuant to the laws of Ohio, and General Code Section 5625-3 authorizing such county and city to levy taxes on such real property.

The acts of the officers in assessing such lands and subjecting them to taxation were in pursuance of such acts requiring them so to do. The complaint contends that such acts in requiring the taxing officers to assess and levy taxes against the premises owned by the United States of America and acquired and used for the purpose of low cost housing, contravenes the Constitution of the United States of America.

C. The date of the judgment or decree sought to be reviewed and the date upon which the application for appeal is presented.

The final judgment here sought to be reviewed was entered and spread of record on November 19, 1943. A motion for a new trial was duly and seasonably filed in said cause and was overruled on January 18, 1944.

The petition for appeal herein was presented and filed on February 9th, 1944.

D. Statement showing that the nature of the case and of the rulings of the Court was such as to bring the case within the jurisdictional provisions relied on.

The United States of America and the Federal Public Housing Authority, a government corporation wholly owned by the United States, originally created as the United States Housing Authority under Section 3 of the Act of Congress of September 1, 1937 (50 Stat. 888) and now known as the Federal Public Housing Authority by reason of Executive Order No. 9070 dated February 27, 1942, filed

a complaint against the county defendants, officers of the County of Cuyahoga, Ohio, charged by the laws of the State of Ohio with the duty of listing and assessing lands for taxation and of levying and collecting taxes thereon, and against defendant the City of Cleveland, a taxing subdivision of said county, setting forth that the United States was the owner of certain lands and improvements in said city, acquired and used by it for the purpose of providing low cost housing pursuant to the "United States Housing Act of 1937" passed September 1, 1937, 50 Stat. 888, 42 U. S. C. 1401-1430."

That said lands of the plaintiffs were assessed for taxation and taxes levied thereon by the defendants in pursuance of the laws of Ohio known as General Code Sections 5328 and 5625-3 providing therefor and requiring that all lands in the State shall be subject to taxation except such as shall have been exempted therefrom pursuant to the laws of Ohio.

The complaint contends that such provision of the laws of Ohio requiring the taxing authorities, defendants herein, to assess and levy taxes against the lands in said city so owned by the plaintiffs for the purpose of providing low cost housing, contravenes the Constitution of the United States of America.

Both interlocutory and permanent injunctions were sought restraining the defendants from assessing said lands for taxation, from taking any action to enforce the payment of taxes levied thereon and from levying any taxes on the same so long as it continued to be owned by the plaintiffs or either of them, and that the taxes levied be declared null and void.

The case came on for a hearing on the plaintiffs' motion for a temporary injunction, before a Special District Court of three judges, pursuant to Section 266 of the Judicial Code, the parties submitted the case for entry of a final order upon the pleadings and stipulation of the parties.

This appeal is prosecuted from the final order so entered allowing a permanent injunction as prayed for in said complaint.

E. Statement of the grounds upon which it is contended that the questions involved are substantial.

The question presented on this appeal is whether lands in Ohio acquired by the United States of America or the Federal Public Housing Authority for low cost housing purposes and improved by the erection of dwellings thereon are immune from taxation by the State.

It is respectfully submitted that the question is substantial because it affects the revenues available to the State and its political subdivisions for the operation of the governmental functions and the performance of duties thrust upon them by such housing developments. It is submitted also that the question presented is substantial in that it likewise affects every other State.

F. Cases believed to sustain the jurisdiction.

The following decision of this Court is believed to sustain the jurisdiction of the Supreme Court of the United States on a direct appeal to review the final order, judgment or decree here in question:

Query, etc. v. *United States, et al.*, 318 U. S. 486.

In that case it was held:

> "An appeal from a decree of injunction granted by a three-judge district court under Federal Code Sec. 266, lies directly to this Court, not to the Circuit Court of Appeal."

G. Statement respecting opinions.

The court below delivered both a majority and a dissenting opinion, and made certain findings of facts and con-

clusions of law in connection with the entry of the decree in question. Copies of these opinions, findings and conclusions, and of the final decree herein, are reproduced as Appendices A, B and C and attached to this jurisdictional statement.*

Respectfully submitted,

FRANK T. CULLITAN,
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of Cuyahoga County, Ohio,
And
RALPH W. EDWARDS,
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Cleveland, Ohio.

* (Clerk's Note) The opinions, findings of fact and conclusions of law are printed as appendices to the jurisdictional statement in the case of *City of Cleveland, v. U. S., et al.*, No. 929 October Term, 1943 and are not duplicated here.

FILE COPY

In the Supreme Court of the United States

No. 68.

OCTOBER TERM, 1944.

CITY OF CLEVELAND,
a Municipal Corporation in Ohio,
Appellant,

vs.

THE UNITED STATES OF AMERICA
and
FEDERAL PUBLIC HOUSING AUTHORITY.

BRIEF OF APPELLANT, THE CITY OF CLEVELAND.

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BRIEF OF APPELLANT, THE CITY OF CLEVELAND.

STATEMENT OF THE CASE.

This appeal arises out of an action filed by the United States of America and the Federal Public Housing Authority against the County Treasurer of Cuyahoga County, the County Auditor of Cuyahoga County, the Board of County Commissioners of Cuyahoga County and the City of Cleveland, Ohio, in the United States District Court for the Northern District of Ohio. Contemporaneous with the filing of the complaint the District Attorney made a request on the trial court for a three Judge court pursuant to the provisions of Section 266 of the Judicial Code. The complaint alleges that jurisdiction is based on the fact that the United States of America was the plaintiff; that the matter in controversy arises under the constitution and laws of the state of Ohio and involves more than $3,000. It alleged that John J. Boyle, the County Treasurer of Cuyahoga County, was actively asserting that taxes on certain government housing projects in the City of Cleve-

land are a proper and lawful lien on the property of the government; that unless enjoined he would continue to attempt to enforce collection of the tax liens and sell the property pursuant to Section 5703 of the Ohio General Code; that the laws of the State of Ohio relating to the taxation of real property, in particular Sections 5328 and 5625-3 of the General Code of Ohio contravene the Constitution of the United States. The plaintiffs prayed for a temporary injunction against the County Treasurer from collecting or taking action to collect said taxes; against the Board of County Commissioners of Cuyahoga County, the auditor of the county and the City of Cleveland for assessing, levying or attempting to levy taxes against the property so long as it continued to be owned by the Federal Public Housing Authority or the United States; that the taxes heretofore levied be declared void and upon final hearing the temporary injunction be made permanent. The case was advanced for immediate trial and no hearing had on the motion for a temporary order.

The housing projects concerned in this action were all projects that were built under the National Recovery Act and were not projects that were in any way concerned with war housing or the war effort. The land on which the projects is located was acquired by the United States government under its power of eminent domain by appropriation from the former private owners thereon.

Prior to January 1, 1940 the projects were administered by the Federal Public Housing Authority but since that date they have been leased to the Cleveland Metropolitan Housing Authority, a public housing agency created under the laws of Ohio. The Cleveland Metropolitan Housing Authority, as did the federal authority when under its control, leases out to individuals, or families, the various residential units that are included in these projects. These facts, together with others, are in the case either as found in the complaint or the stipulation as to facts upon

which this case was tried. No other testimony was taken.

This appeal comes to the United States Supreme Court by a direct appeal from the judgment of the Special District Court of three Judges convened under authority of Section 266 of the Judicial Code. Upon trial a divided court made a finding in favor of the plaintiffs to the effect that the property since the date of its acquisition by the United States has been immune from any form of taxation or special assessment and in the absence of Congressional consent said property cannot be subject to any form of state taxation or special assessment as long as it continues to be owned by the United States of America or the Federal Public Housing Authority; that the taxes and assessments appearing of record against this property since its acquisition are null and void; that the defendants, its successors and assigns are hereby enjoined to take any action to enforce the tax liens; that they be ordered to cancel them of record and remove the land from the tax rolls.

JURISDICTION OF THE THREE JUDGE COURT.

No question of the jurisdiction of the three Judge Court was raised by this appellant but upon the case being filed in the Supreme Court of the United States the judges of that court suggested the question of its jurisdiction and counsel was requested to discuss in its briefs and in oral argument the question as to whether Section 266 of the Judicial Code is properly applicable to these cases so as to give this Court jurisdiction of the appeal.

A three Judge Court under the authority of Section 266 of the Judicial Code was requested by the plaintiff at the time of the filing of the petition. No hearing was held with reference to plaintiff's request for a three Judge Court and when defendants appeared for trial the three Judges were on hand to hear the case. We did not object as it was our opinion that the court would have jurisdiction by reason of the county treasurer being involved, whose

office performs many state duties in spite of the fact that he is elected within the county. All general taxes coming to the City of Cleveland and all special assessments levied or special improvements are collected by the county treasurer and it was our opinion that we would have to go along with the three Judge Court since we had been joined as defendant with our tax collection agency which we looked upon as being clothed with state powers.

At the outset we must concede that the City of Cleveland is not a state officer; we must concede that it does not levy taxes for the State of Ohio; that if we had been the sole defendants in this case we would undoubtedly come within the case of *Ex Parte National Bank* (278 U. S. 101) which has been called to our attention by this Court. We say however that our right to be here under the jurisdiction of this Court must depend upon whether this Court has jurisdiction of the county defendants that were originally named in this action. If any of the county defendants in the trial court have a right of appeal direct to this Court; we do not believe that it could reasonably be held that any appeal from the decision of the trial court by the defendant City of Cleveland must be by way of the United States District Court of Appeals while the other defendants make their appeal direct to the Supreme Court.

There might be some logic in the proposition that the City of Cleveland was improperly joined in the first place. Since we are vitally interested in the tax collections of the County Treasurer and obtain all our moneys through that source, we did not make further objection to the jurisdiction. If this Court should reach the conclusion that the City of Cleveland had no place in this action at the very beginning, we trust that it will give consideration to our brief on the basis of our being *amicus curiae*.

The cases called to our attention by this Court on the question of jurisdiction are all in substance to the effect that the three Judge Court does not have jurisdiction un-

less both of the following elements are present: (a) an attempt to restrain a state officer from enforcing a duty imposed by the state law, (b) an allegation that the state law contravenes the constitution. So far as the complaint is concerned it alleges both of these facts. The question remains, is the county treasurer or the county auditor, or the Board of County Commissioners state officers or officers performing state functions within the meaning of Section 266 of the General Code.

Under the laws of Ohio the Board of County Commissioners is the tax levying authority for general taxes not only for the county but for the municipal corporations therein; the City of Cleveland has power to make levies for special assessments, all of which levies are collected by the treasurer of Cuyahoga County and the duty of assessing taxes is upon the County Auditor. In addition to collecting taxes for the county and political subdivisions therein, the county treasurer collects a variety of taxes for the State of Ohio. The county commissioners make levy of taxes to produce money which is used for the maintenance of many state functions. The county auditor makes assessments which are designed to raise money that go to the State of Ohio. This situation we believe brings these county officials at least within the purview of one of the cases which this Court has called to our attention, to-wit, *Spielman Motor Sales Co., Inc., v. Dodge*, 295 U. S. 89, wherein this Court pointed out in the first syllabus:

> "1. District attorneys in New York, though classed by statute as local officers, are part of the judicial system of the State, and, in enforcing state laws of general application by criminal prosecution, perform a state function within their respective counties and are officers of the State within the meaning of Section 266, Jud. Code, p. 92."

We contend the various county officials named as defendants in the original complaint stand in a similar re-

lation to the State of Ohio as the District Attorney of New York does to the State of New York and in support of this we enumerate activities of these officials and functions exercised by them in the interest of the State of Ohio and, which make them a part of the tax levying and collecting system of the State of Ohio.

(A) Under Section 5625-1 of the General Code of Ohio the county commissioners are designated as the taxing authority in the case of the county and under Section 5625-3 of the General Code they are authorized to levy taxes annually on the real and personal property within the county for the purpose of paying the operating expenses of the subdivision and all such taxes levied are extended on the tax duplicate by the county auditor of the county. Out of these taxes are paid the expense of maintaining the county judicial system including the greater part of the salaries of the judges of the common pleas court and the courts of appeals (See General Code Sections 5637, 2251, 2252, 2252-2 and 2253-2), and the salary and expense of the clerk of courts (General Code Sections 2981 and 2993), our Jury Commission and our County Probation Department. The Court of Common Pleas is our state trial court of original jurisdiction and in this court are tried the felony cases in which the State of Ohio is the plaintiff. These judges may be sent by the Chief Justice of our Supreme Court to preside in other counties than in Cuyahoga. In many instances a Court of Appeals has jurisdiction over more than one county. The clerk of the courts not only keeps the records of the court but also has the duty of receiving and filing certificates of title for automobiles under a state-wide law for the registration of automobiles. (See General Code No. 6290-5.) The last paragraph of Section 6290-5 requires that the clerk of courts in the administration of the certificate of title law shall forward all taxes to the treasurer of the state and furnish such information to the tax commission as it may require.

(B) Out of the same taxes levied by the county commissioners are paid the costs of maintaining the office of the prosecuting attorney of the county whose duties require him to inquire into and prosecute crimes within the county and to prosecute the same on behalf of the state, together with complaints, suits, controversies in which the state is a party. (See General Code Sections 2914, 2915, 2916, 3003, 3004 and 3004-1.).

(C) Likewise the same taxes support the office of the sheriff including the maintenance and support of prisoners in the county jail. These taxes go to paying the expense of maintaining the Board of Elections which controls matters relating to the state and even national elections in the respective counties of the state.

The county treasurer has the duty not only of collecting these taxes but is also the tax collecting agent for taxes which are solely for the benefit of the state.

(D) Under the statutes of Ohio relating to public revenues and funds Section 2288 of the General Code designates the office of the nearest county treasurer as a depository for officers who are collecting state moneys; liquor taxes, intangible taxes on personal property that go first to the state, and state inheritance taxes of which the state of Ohio gets one-half, these are all paid into or collected by the county treasurer. The county auditor by various statutes is required to keep account of the funds belonging to the state that are in the county treasury and report thereon. For example see Section 2568 of the General Code of Ohio requiring a current account between the county auditor and the county treasurer.

(E) The State of Ohio has an inheritance tax and it will be noted by our General Code Section 5348-11 that after distributing one-half to certain subdivisions the remainder of the tax after deducting costs and fees, is for the use of the State of Ohio and is paid into the state treasury to the credit of the general revenue fund. This tax is collected

by the county treasurer. (See General Code Section 5338.)

(F) Under our intangible tax law the county auditor compiles a duplicate of all the real and personal utility property in the county. (General Code Section 2583.)

Under Section 2584 in the General Code it is required the county auditor compile a general tax list and a general duplicate of personal property.

Under Section 2600 the auditor is required to send copies of settlements with the treasurer to the auditor of state.

Under Section 2608 the county auditor is required to prepare an abstract of delinquent taxes and send the same to the auditor of the State.

(G) In the State of Ohio we have a State Bureau of Inspection and Supervision of Public Offices within the Department of the Auditor of State which audits and inspects and reports to the state on the books and accounts of various political subdivisions, state institutions and money collecting officials. The expense of this state department under Section 2740 of the General Code is paid by the taxing district such as the county and the money for payment of this expense is withheld from the real estate taxes collected in the county. Section 287 relating to the same subject provides for the auditor of state drawing upon the treasury of various counties to make up a proportion of the expense of the auditing bureau.

(H) Section 1465-65 requires the fiscal officer of each taxing district to file a report showing the money expended by the district for workmen's compensation during the calendar year.

Section 1465-66 requires each county auditor to file a receipt of the report just mentioned to issue his warrant in favor of the treasurer of the State of Ohio on the county treasurer of the county, for the aggregate amount due from such county and the taxing districts therein, to the public insurance fund, and the county treasurer

is required to pay the amount called for by such warrant from the county treasurer.

(I) From the taxes levied by the county commissioners and collected by the county treasurer, a part of the salaries of the municipal judges of Cleveland are withheld and paid on behalf of the state by the county auditor. The county is authorized and instructed to pay part of these salaries under Section 1579-3 of the General Code and this disbursement is on the theory that the municipal court in its jurisdiction as a magistrate to hold preliminary hearings on felonies and its jurisdiction to hear misdemeanor cases which are violations of the state law are performed in part as a state function. Likewise part of the salaries of the prosecutors of the municipal court are paid from these taxes levied by the county commissioners and collected by the county treasurer and payment is made on the same theory as mentioned for the municipal judges.

These various activities seem to indicate rather definitely that the county officers named herein are state officers in the sense that they perform functions for the state of Ohio, collect and pay over taxes that inure to the benefit of the entire State of Ohio and the treasurer is duly designated as a depository for collectors of state funds.

We contend that the county auditor and county treasurer perform state functions as much as the agents of the tax commission of the State of South Carolina in the case of *Query v. United States* in 316 U. S. 486 and is in the same status as the prosecuting attorney is found to be in the *Spielman* case, 295 U. S. 89.

If this Court after hearing the arguments in this case is of the opinion that the county officials named in this case are not state officers within the meaning of Section 266 and that this Court is without jurisdiction, then we request the Court to consider a motion *sua sponte* and dismiss the appeal with instructions that the case be remanded to the

district court, the decree of that court vacated and for further proceedings to be taken independently of Section 266 on authority of *Rorick vs. Board of Commissioners of Everglades Drainage District*, 307 U. S. 208, or reverse the decree and remand the cause for further proceedings independent of Section 266 as was done in the case of *Gulley vs. Interstate Natural Gas Company*, 292 U. S. 816.

ARGUMENT.

In the State of Ohio all property of the United States government is exempt from taxation if it is used for a public purpose. (See General Code Section 5351.)

The Supreme Court of the State of Ohio has held that our own state housing projects are subject to taxation because the act of providing housing is not considered a public purpose. (See *Columbus Metropolitan Housing Authority vs. Thatcher, et al.*, 140 O. S. 38.) After the decision in that case, cases involving the federal housing authority have been taken to that court. On April 26, 1944 in the case of *Federal Public Housing Authority vs. Guckenberger, Auditor*, 143 O. S. 251, it was held that property owned by an instrumentality of the United States is not *ipso facto* immune from taxation; that the business of operating a group of residential buildings, heating plant, containing offices and retail store rooms, was not exclusively a public use and the property was being used in a proprietary capacity. Likewise, in the case of *Youngstown Metropolitan Housing Authority vs. Evatt, Tax Commissioner*, decided May 1, 1944 and reported in 143 O. S. 268, it was again held that the operation of housing units by a governmental body was not an exclusive public purpose and was subject to taxation. In the trial of the case at bar the government contends that our federal authority has no proprietary powers. We agree with the bald statement. The proprietary powers as we understand them under our laws are special powers sometimes given to a political body to operate a certain

type of business, particularly utilities, for the use of inhabitants and to operate them as if they were an ordinary private corporation under our laws in Ohio. Such powers are specifically given to municipalities to operate light plants or transportation systems, but in all such operations they are deemed to stand in the same position as a private corporation and have like powers and like liabilities. (One of the leading cases is *Travelers Insurance Company vs. Village of Wadsworth*, 109 O. S. 440.) Such proprietary powers can only be exercised by states when specifically granted by state law or state constitutions and cities are not permitted to go into any business they see fit under their proprietary powers as for instance the City of Cleveland which owns a large underground garage in connection with its Public Hall and when it attempted to rent the garage to the general public during periods when there were no exhibitions at the Public Hall a suit was brought to restrain the city from entering into this sort of private enterprise on the grounds that it was not authorized by law. The court granted the injunction and our Supreme Court held that such action by the City of Cleveland was an undue interference with the constitutional right of private business. (*City of Cleveland vs. Ruppel*, 130 O. S. 465.) When plaintiffs say that the government has no proprietary powers but at the same time contend for the right of the government to enter into private enterprise such as running apartment buildings and entering into the relationship of landlord and tenant with the general public, they are merely contending that since the government has no proprietary powers, therefore when they act in a proprietary capacity we will have to call it a governmental power.

The rights of the United States government are specifically delegated to it by the constitution of the United States and the tenth amendment to our constitution specifically provides that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively or to the people."

We are mindful of the various federal activities that have been approved as legitimate within the general welfare clause of the constitution, but we feel that it's stretching that clause too far to say that it authorizes the government to go into the business of building or operating apartments to rent out to certain classes of persons or to the public generally.

We are also mindful of the numerous decisions of this Court particularly the *Van Brocklin* case (117 U. S. 151), which makes the point that property of the United States government is not taxable. The *Van Brocklin* case, or *McCulloch vs. Maryland* (1819) are relied upon and referred to in nearly all decisions on this point. The *McCulloch* case was decided rather early in the history of this Court and we believe at a time when no person contemplated that the government of the United States would engage in the housing business, but even in the *Van Brocklin* case they took the precaution to point out that the government could not hold property for any private purpose that it saw fit and we find in 117 U. S. at the bottom of page 158, in the body of the Opinion the following statement:

> "The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, 'to pay the debts and provide for the common defence and general welfare of the United States.'" (Constitution, Art. I, Sec. 8, cl. 1.)

We believe it is time that the subject be reviewed and that this Court should again scrutinize this problem, particularly in view of the fact that such a great amount of property, formerly privately owned, is now held by the

United States government. It does not seem just and equitable that the government should assemble great numbers of families in large apartments in the city where they have the benefit of fire and police protection, public health services, water systems, electric lighting of the streets, school facilities and numerous other expensive conveniences that are found in a large city without paying its proportionate share of the cost of these services. And this is pointed out in what we believe to be excellent language in the body of the opinion of our Ohio Supreme Court in the case of *Youngstown Metropolitan Housing Authority vs. Evatt, Tax Commissioner*, 143 O. S. 268, under which decision at page 273 the court said:

> "The cornerstone of a democracy is that he who enjoys the privileges, benefits and protection thereof should bear his proportionate share of the expense, therefore funds produced by taxation are the very lifeblood of government, without which it soon would become impotent. That consideration forms the background for the rule that he who seeks exemption of property from taxation must show by clear and convincing proof his right thereto. In all doubtful cases exemption is denied."

In the City of Cleveland its various suburbs are now being confronted with taxpayer suits in which taxpayers seek to enjoin public officials from rendering public services to the inhabitants of these federal projects and seeking to prevent entrance of the children residing in these projects to our public schools for the reason that they or their landlord, the United States government, is not paying any part of the expense or upkeep. We feel that under no sense of justice should the other citizens of the State of Ohio be required to pay the expense of the upkeep of the schools and pay taxes on real estate to maintain other public services which inure to the benefit of thousands of people who do not contribute to real estate taxes either directly or through their landlord.

THE OWNERSHIP OF REAL ESTATE BY THE FEDERAL GOVERNMENT FOR THE PURPOSE OF OPERATING APARTMENT HOUSES IS NOT THE EXERCISE OF A SOVEREIGN POWER.

We note the trend of the decisions of the United States Supreme Court to be to the effect that no real estate belonging to the United States government is taxable by a state. This proposition must naturally be based upon the theory that taxation of Federal property by a state is inconsistent with sovereignty. The United States government obtains all its sovereign powers from the constitution and we believe that the powers delegated are those necessary for governmental purposes. That by the tenth amendment of the constitution all other powers not delegated or not prohibited are reserved to the states and the people. We are perhaps a little bit old fashioned in our view that Article I, Section 8 relating to general welfare does not confer any additional powers on the federal government and that the words "provided for the general welfare" merely state a purpose for which Congress may lay and collect taxes, etc. We are mindful of the case of *United States vs. Butler*, 297 U. S. 1, but we feel that this case like the cases following *Van Brocklin v. Tennessee* deserve further consideration by this Court. And on this basis we say that the federal government is not acting as a sovereign in owning and operating housing projects such as those established under the National Recovery Act. This point was quite thoroughly argued in the companion appeal in the case of *Boyle vs. United States of America*, No. 69, October Term 1944, and we respectfully refer the Court to the arguments set forth in the appellant's brief in that case on this point. The Court has also suggested to us the question as to whether or not the land in controversy would be taxable even if the Federal Housing Act of 1937 were unconstitutional. We must admit that under some of the older decisions by this Court the constitutionality of the act would not affect the right to tax, but again it is our contention

that lands of the federal government acquired and held not in its sovereign power should be taxable. We do contend however that the housing act is unconstitutional and particularly as to provisions therein exempting the housing projects from taxation. (42 U. S. C. A. 1405 (e).)

CONCLUSION.

The questions relating to the construction of the general welfare clause and the questions relating to the right of power to tax have been so thoroughly discussed in other briefs filed in this case that we have not burdened the Court in further discussing them at length. The case of *McCulloch vs. State of Maryland* which is one of the original cases on the right to tax government property was decided in the year 1819, but even after that there was always doubt among the early legislators and United States attorneys about the right of a state to tax property of the United States. This is pointed out by a rather lengthy discussion in the case of *Van Brocklin vs. Tennessee* (117 U. S.) beginning on page 162 which begins with the year 1804 pointing out that the act establishing the territorial government after the Louisiana purchase indicated that they thought it necessary to provide that the legislative council of the territory should have no power to tax the lands of the United States. One of the conditions of the Act of 1811 and 1812 under which the state of Louisiana was admitted to the Union was that the people agree that lands of the United States remain exempt from any tax laid by order or under the authority of the state. Similar provisions are found with reference to the admission of Mississippi in 1817; Alabama in 1819; Missouri in 1820; Arkansas in 1836; Michigan in 1837; Iowa in 1845; Wisconsin in 1847; Minnesota in 1857 and Oregan in 1859. Florida was admitted in 1845 upon the express condition that it would not levy any tax on public lands of the United States. Likewise California in 1850. It thus distinctly

appears that there was doubt in the early days and notwithstanding decisions of this Court such as *United States vs. Butler*, 297 U. S. 1 and *Helvering vs. Davis*, 301 U. S. 619, there still appears to be a difference of opinion, as is evidenced by these cases that are now before the Court and as is further evidenced by decisions of the Supreme Court of the State of Ohio which we have heretofore cited. So we urge that this proposition be carefully reconsidered by this Court, particularly the interpretation of the general welfare clause in the *Butler* case.

And finally in conclusion we say that the matter of looking after the welfare of citizens so far as providing them with housing, if it is a public matter, it is within the dominion of the powers of the respective states and not the United States government.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 930.

JOHN J. BOYLE,
County Treasurer of Cuyahoga County;
JOHN A. ZANGERLE,
County Auditor of Cuyahoga County;
BOARD OF COUNTY COMMISSIONERS OF
CUYAHOGA COUNTY, OHIO,
Appellants,

vs.

THE UNITED STATES OF AMERICA
and
FEDERAL PUBLIC HOUSING AUTHORITY.

COUNTY APPELLANTS' BRIEF.

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In the Supreme Court of the United States

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JOHN J. BOYLE,
County Treasurer of Cuyahoga County;
JOHN A. ZANGERLE,
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BOARD OF COUNTY COMMISSIONERS OF
CUYAHOGA COUNTY, OHIO,
Appellants,

vs.

THE UNITED STATES OF AMERICA
and
FEDERAL PUBLIC HOUSING AUTHORITY.

COUNTY APPELLANTS' BRIEF.

STATEMENT OF THE CASE.

The complaint herein was filed on July 14, 1943 in the United States District Court for the Northern District of Ohio, by the United States of America and Federal Public Housing Authority against the Board of County Commissioners of Cuyahoga County, Ohio, the Auditor and the Treasurer of said County, and the City of Cleveland, a municipal corporation in the county. The relief sought was an order enjoining such defendants from assessing, levying and collecting taxes against premises in the City of Cleveland acquired and used by the Federal Public Housing Authority for low-cost housing purposes, and leased by it for such use and purposes to the Cleveland Metropolitan Housing Authority, a public housing agency created under the laws of Ohio. A motion for an interlocutory order to that

effect was filed therein by plaintiff, and therein it was requested that such motion be heard by a three-Judge Court in accordance with the provisions of Section 266 of the Judicial Code. No factual issue was presented. The facts are set forth in the pleadings and stipulations between the parties, and a finding in accordance thereon was made by the Court. All these appear in the record and need no further mention.

This is an appeal by the county defendants from the judgment of the Special District Court of three Judges which declared such premises to be immune from taxation by the State of Ohio or any of its political subdivisions, because of its ownership by the United States, and ordered the cancellation of taxes levied against such premises during such ownership, and enjoined defendants from collecting such taxes, and from making any further levy. We assert such judgment to be erroneous in holding such land to be immune from taxation and the taxes void.

JURISDICTION OF THE THREE JUDGE COURT.

The question has been raised whether the county appellants, consisting of the County Auditor, County Treasurer and Board of County Commissioners, were acting as officers of the state, or on behalf of the state, within the meaning and purpose of Section 266 of the Judicial Code, in the assessing, levying and collecting of the taxes complained of in this action against the real estate of the plaintiff so as to authorize the convening of the three judge court herein.

Taxes which defendants were enjoined by order of Court in this case from assessing and collecting, consist of separate levies by the County of Cuyahoga, the City of Cleveland, and the Cleveland City School District. The levying or taxing authorities are respectively the Board of County Commissioners of Cuyahoga County, the Council of the City of Cleveland, and the Board of Education of the Cleveland City School District. The assessing and collect-

ing authorities as to all such levies are the County Auditor and the County Treasurer.

On behalf of the appellant county officers we maintain that in the assessing, levying and collecting of the taxes so levied by the Board of County Commissioners, such officers were acting as officers of the State and in the exercise of State functions.

As the taxing authority of the county (General Code Section 5625-1C) the Board of County Commissioners is required to levy taxes for the current operating expenses of the county (General Code Section 5625-3). Such operating expenses include the following:

A. The cost of maintaining the County Judicial system, including all but a minor portion of the salaries of the judges of the Court of Common Pleas and of the Court of Appeals (General Code Sections 5637, 2251, 2252, 2252-2, 2253-2) and including also the salary and expenses of the Clerk of Courts (General Code Sections 2981 and 2993), the Jury Commission (General Code Sections 11419-4, 11419-7 and 11419-43), and the County Probation Department (General Code Section 1554-1).

B. The cost of maintaining and operating the office of the Prosecuting Attorney of the County, who is required "to inquire into the commission of crimes within the County and, except when otherwise provided by law, shall prosecute on behalf of the State all complaints, suits and controversies in which the State is a party * * *" (General Code Section 2914, 2915, 2916, 3003, 3004 and 3004-1).

C. The cost of maintaining and operating the offices of Sheriff, including the maintenance and support of prisoners in the County Jail (General Code Sections 2994, 2981 and 2997).

D. The expense of maintaining the Board of Elections, consisting of four members appointed by the Secretary of State (General Code Section 4785-8), the registration of voters, and the cost and expense of conducting general and county elections (General Code Sections 4785-18 and 4785-21).

This list of functions performed by such local officers on behalf of the State and in conformity with statutes of State-wide application could be extended. However, we believe the foregoing is sufficient to demonstrate that such officers, in the exercise of the taxing power for such purposes, act for and on behalf of the State.

In order that such taxes may be levied the County Auditor is required to assess the real estate in his county for such purposes (General Code Sections 5328, 5625-3 and 5548), and in so doing is under the direction and supervision of the Tax Commission of Ohio (General Code Section 5579). The expense thereof is payable from the county general fund, but the amount allowed therefor may be fixed by the State Tax Commission (General Code Section 5548). An abstract of such assessments setting forth the aggregate amount and valuation of each class of property in the county and in each taxing district therein, as it appears on the auditor's tax list, is required to be certified by such auditor to the State Tax Commission (General Code Section 5612), and is subject to review by the said commission (General Code Section 5613).

Against the tax list thus prepared the auditor is required to extend the tax rate levied by the state, if any, and that levied by the county and other taxing districts therein, as revised by the County Budget Commission, and certify the same to the County Treasurer for collection (General Code Section 5625-23).

Regarding the purpose of the Congress in enacting Section 266 of the Judicial Code it was said in the case of *Connecting Gas Co. v. Imes*, 11 F. (2nd) 191:

> "The mischief at which Section 266 is directed was well understood at the time of its passage. It was the typing up of the operation of an act of a state legislature, or of an order of the state commission, in either case affecting the state at large, [redacted] the operations of the state commission, board or o[redacted]als. It was thought unseemingly that one district judge should be per-

mitted to set aside the deliberate acts of a legislature, or a commission or board of that nature acting for or in the name of a sovereign state."

And in another case the purpose was said to be to make such an injunction "a matter for the adequate hearing and full deliberation which the presence of three judges was likely to secure." *Public Service Commission v. Brashear Freight Lines*, 306 U. S. 204.

From what has been hereinbefore said as to the functions and duties of the public officers mentioned, it appears that the mischief recited in the quotation above made would result from an injunction as contemplated by the act in the circumstances of this case. The effect of enjoining the officers mentioned from assessing property, preparing the tax list, levying the taxes, and collecting the same would prevent such officers from performing duties imposed upon them by acts of the legislature for the benefit of the entire State of Ohio and deny to the state the benefits of such revenue. Such an order, we submit, granted by a single judge and having such wide spread effects upon the exercise of the sovereign power of the State, is the very mischief to remedy which the act was passed.

It has been fully recognized by this Court that the mere fact that the officer against whom the order is sought is a local officer rather than a state officer is not in all circumstances determinative of the question of jurisdiction. In the case of *ex parte*: *In the matter of the Public National Bank of New York*, 278 U. S. page 96, in which the action was one to enjoin said tax officers, the Court said:

"Our attention is directed to several cases disposed of under Section 266 where the court passed on the merits although the suits were against local officers. We do not stop to inquire whether, at least in some of these cases, the so-called officers in fact represented the state or exercised state functions in the matters involved and properly might be held to come within the provisions of section 266 now under review."

And so in the case of *Rorich v. Everglades Drainage District*, 307 U. S. 208, this Court recognized that a local officer may in enforcing a statute which embodies a policy of state-wide concern, be performing a state function within the meaning of section 266 of the Judicial Code, though he is localized by his geographic activities and the mode of his selection, and the Court in such case recognized also that though the officer be a state official charged with a duty under a statute not of state-wide concern, but one having application exclusively to a particular district of the State that with respect to such functions the official is not a state functionary within the meaning of that section.

In the case of *Spielman Motor Sales Co. Inc., v. Dodge*, 295 U. S. 89, suit was brought to restrain the district attorney of New York County from instituting a criminal prosecution for an alleged violation of a Code of Fair Compensation under a state law alleged to violate the Federal Constitution. The Court held in such case that such suit was within Section 266 of the Judicial Code requiring suits for an interlocutory injunction to restrain the enforcement of a state statute by any officer of the state to be heard by three judges, "the district attorney being an officer of the state within the meaning of that provision and the statute attempting to establish a state-wide rather than a merely local policy."

While it is true that under the laws of the State of Ohio these officers are regarded as county officers, by reason principally of their being elected by the voters in each county, it cannot be surmised that Congress in enacting Section 266 and in using the term "state officers" intended that such term should apply only to such officers in each state as under the system of each such state was designated a state officer. Manifestly such application of the term would lead to opposite results in different states. It seems clear that the Congress intended such designation of state

officer to mean one who was charged with the performance of state functions.

We therefore say with respect to these officers, what was said in the *Spielman* case above referred to, of the district attorney of New York:

> "In this view we cannot regard the local description, or the method of selecting the officer as decisive with respect to the application of section 266 of the Judicial Code * * * to determine the application of this provision, we must have regard both to the nature of the legislative action which is assailed and to the function of the officer who is sought to be restrained."

And again in such case it was said:

> "Where a statute embodies a policy of state-wide concern an officer, although chosen in a political subdivision and acting within that limited territory, may be charged with the duty of enforcing the statute in the interest of the state and not simply in the interest of the locality where he serves. This is especially true in the case of a prosecuting attorney who acts for the entire state, as a part of its machinery of enforcement, in proceedings against violators of the state's statute. The functions of such an officer, in enforcing a statute of general application, is of controlling importance in giving effect to the intent of the Congress. * * * In that enforcement, he is acting in a true sense as an officer of the State."

In the *Public National Bank of N. Y.* case, 278 U. S. 100, 73 L. ed. 202 the taxes were levied by the officers of the city "*and for the sole use of the city,*" and for that reason this Court held that the suit was not within the provision of Section 266 requiring a three-judge court.

Likewise in *Rorich v. Board of Commissioners of Everglades Drainage District*, 307 U. S. 208, 83 Law Ed. 1242, the subject of the action was taxes levied for the benefit of a local drainage district under an act of the legislature establishing that particular district only and conferring upon it power to levy such taxes. The Court held that a

three-judge court can be involved only in a suit involving a statute of general application as distinguished from one affecting a particular municipality or district.

These cases are plainly inapplicable to the facts in this case.

We respectfully submit that in respect of the assessment levying and collecting the taxes herein complained of against the real estate of the plaintiff and for the purposes hereinbefore enumerated, the board of county commissioners, the county auditor and the county treasurer were in the exercise of a duty charged upon them by a general statute applicable to all counties in the State, embodying a policy of state-wide concern and in the interest of the State, and that in so doing they were acting for and on behalf of the State and not in the interest of the county only.

ARGUMENT.

The Acquisition and Use of Lands by the Federal Government for Low Cost Housing and Slum Clearance, Was Not the Exercise of a Power in Respect of Which it is Sovereign, and Therefore May Not Be Exercised in Derogation of the Sovereign Power of the State to Tax Such Lands.

This Court has repeatedly declared the property of the Federal government and the instrumentalities or means necessary or proper for carrying out the powers of the Federal government, to be immune from taxation by the States. Whether there is any limitation to this rule, and if so, what it is, has, we believe, never been decided. In the absence of some limitation thereof, the destruction of the sovereignty of a state through the destruction of its power to tax is but a matter of the extent to which the Federal government acquires land therein. We believe there is a limitation and that such limitation grows out of the same considerations and necessity that gave use to the rule—the preservation of the sovereignty of the Federal government and the states within their respective spheres.

In the celebrated case of *McCulloch v. Maryland*, Chief Justice Marshall said:

> "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."

The case at bar illustrates the truth of Justice Marshall's prophecy.

It is a mere commonplace to say, but it seems necessary to do so, that in our Federal System of government,

the general government is sovereign in some fields of governmental powers and the states in others. And as said in *Ableman v. Brooks*, 62 U. S. 506, 16 L. Ed. 169:

> "While the power of the general government and of the state both exist and are exercised within the same territorial limits, they are separate and distinct sovereignties."

The essence of these principles derived from our Constitution is that in the sphere in which the Federal government is sovereign, the states must bow to it. In the field in which the states are sovereign, the Federal government must yield. The courts have ever been mindful of their responsibilities in the preservation of the rights of both the Federal and State governments.

In the case of *Texas v. White*, 7 Wall. 700; 19 L. Ed. 237, Chief Justice Chase said:

> "The preservation of the states and maintenance of state government are as much within the design and care of the constitution as the preservation of the union and the maintenance of the national government. The constitution, in all its provisions, looks to an indestructible union, composed of indestructible states."

Immunity from taxation is an attribute of sovereignty. The subjection of the property of the sovereign to taxation by another power is incompatible with, and a denial of its sovereignty. Likewise the right to tax is an attribute of sovereignty, and any interference with that right is incompatible with and a denial of its sovereignty in that respect. The so-called doctrine of immunity from taxation of property of the sovereign grew out of our Federal system as one necessary to the protection of the powers of the states and of the general government in the fields in which they respectively are sovereign, and is limited by the extent of such sovereignty. Hence it has no application where the property proposed to be taxed is not held or used in the

exercise of a sovereign power. This was the basis of the decision in *State of Ohio v. Helvering*, 292 U. S. 360, 78 L. Ed. 1311, in which it was held that a State engaging in the business of selling liquor is not immune from the Federal excise tax, because in carrying on such business the State was not in the exercise of a sovereign power. To hold otherwise would deny the sovereignty of the taxing power, and in a large measure destroy it, thus defeating the purpose of the doctrine.

Carter v. Carter Coal Co., 298 U. S. 238, 80 L. Ed. 1160, p. 1180:

> "While the states are not sovereign in the true sense of that term, but only quasi-sovereign, yet in respect of all powers reserved to them they are supreme—'as independent of the general government as that government within its sphere is independent of the States.' *Collector v. Day* (*Buffington v. Day*), 11 Wall. 113, 124, 20 L. ed. 122, 125. And since every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom."

It is evident therefore that the question presented by this case does not involve the constitutionality of the act of Congress providing for low-cost housing and slum clearance, but only whether the power exercised by the general government in pursuance of such acts of Congress, in acquiring large areas of land in the several states and in the erection thereupon of low cost housing, thereby effecting slum clearance, is a power of the general government in respect of which it is sovereign.

The states remain sovereign within their separate spheres as to all powers not delegated to the general gov-

ernment or prohibited to the states. Subject to these restrictions each state is supreme and possesses the exclusive right of regulating its own internal affairs, and in all such matters is sovereign so long as it does not conflict with the Federal Constitution. In general, the states may exercise any power possessed by them prior to the adoption of the Constitution, unless the exercise of such power is expressly or by necessary implication prohibited thereby, or interferes with the exercise of some power delegated to the United States. Under our system of government the powers of sovereignty are divided between the Federal and State governments. They are each sovereign with respect to the rights committed to it, and neither sovereign with respect to the rights committed to the other. *McCulloch v. Maryland*, 4 Whea. 316, 4 L. Ed. 579. *Texas v. White*, 7 Wall. 700, 725, 19 L. Ed. 227, 237. *Opinions of Justices*, 14 Gray 614, 616.

The acts of Congress under which the lands in question were acquired, held and improved for low cost housing and slum clearance projects recite that the authority thus exercised by Congress was in pursuance of the general welfare provision of the Constitution.

Much has been said and remains to be said about the nature and extent of the power conferred upon Congress by Art. 1, Sec. 8, Clause 1 of the Constitution.

Mr. Justice Story in his work on the Constitution (Vol. 1, 4th Cooley Edition) said:

> § 907. "Before proceeding to consider the nature and extent of the power conferred by this clause, and the reasons on which it is founded, it seems necessary to settle the grammatical construction of the clause, and to ascertain its true reading. Do the words, 'to lay and collect taxes, duties, imposts, and excises,' constitute a distinct substantial power; and the words, 'to pay the debts and provide for the common defence and general welfare of the United States,' constitute another distinct and substantial power? Or are the

latter words connected with the former so as to constitute a qualification upon them? This has been a topic of political controversy, and has furnished abundant materials for popular declamation and alarm. If the former be the true interpretation, then it is obvious that under color of the generality of the words, to 'provide for the common defence and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers; if the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of a national character, 'to pay the debts and provide for the common defence and the general welfare.'"

§ 908. "The former opinion has been maintained by some minds of great ingenuity and liberality of views. The latter has been the generally received sense of the nation, and seems supported by reasoning at once solid and impregnable."

And in further exposition of his views as to the proper interpretation of this proposition he quotes with approval the following by Mr. Jefferson:

"To lay taxes to provide for the general welfare of the United States is," says he, "to lay taxes for *the purpose* of providing for the general welfare. For the laying of taxes is *the power*, and the general welfare the *purpose* for which the power is to be exercised." 1 *Story on the Constitution*, Sec. 926—Cooley's 4th Ed.

The views thus expressed have found approval and acceptance by this Court over a period of many years. In *U. S. vs. Butler*, 297 U. S. 1, 80 L. Ed. 478, it is said:

"The power conferred by Article 1, § 8, Clause 1, of the Federal Constitution to lay and spend taxes to provide for the general welfare, is not restricted to the enumerated legislative fields committed to Congress by the other provisions of the article, but confers a substantive power to tax and appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare."

The qualification attached to the grant of power to levy and spend taxes, that it shall be for the general welfare, cannot be construed to be a delegation to the United States of the power of each state to provide for the welfare of its citizens.

The power delegated by this provision is the power to tax. It does not delegate to the United States power to make laws for the general welfare. *Carter vs. Carter Coal Co.*, 298 U. S. 238, 292; 80 L. Ed. 1160, 1179. So that the states each retained the power to provide for its own welfare. None of the soverign powers of the states were subjected to any limitation or restriction by a delegation to the general government of power to provide for the general welfare, because no such grant was made. It follows therefore that the exercise and operation of the sovereign powers of the state may not be limited or destroyed by the Federal Government in the use of its powers to levy and expend taxes for the general welfare.

It appears from the admitted facts in this case that in carrying out its low cost housing and slum clearance projects in the City of Cleveland, the Federal Public Housing Authority has acquired large tracts of land and erected thereupon buildings containing residence for thousands of occupants and in some projects retail stores to provide shopping facilities for the tenants and for the general public.

These lands, like all other lands in the state, have always heretofore been subjected to taxation by the laws of the state, for the purpose of providing revenue to defray the expenses of local government, including therein governmental, educational, utility and benevolent services, benefits and facilities.

The right of the state through its local political subdivision to continue the exercise of its sovereign power to levy taxes upon such lands for the purpose of local government is denied by the plaintiffs. It is asserted that the

state has lost its right so to tax the lands so acquired by the Federal government because of the latter's ownership thereof.

The cases decided by this Court which are authority for the proposition that property owned by the Federal government is not subject to taxation by the state, will upon examination be found to be cases in which the property sought to be subjected to State taxation was owned by the Federal government by virtue of the exercise of a delegated power. Thus in the case of *McCulloch v. State of Maryland* the question was whether the State might impose a tax upon notes issued by the Bank of the United States. It was held that the creation of the Bank of the United States was within the power of the Federal government as a means appropriately adopted to carrying into execution a sovereign delegated power and that the state had no power to tax the means employed for the execution of its powers.

Likewise in the case of *Van Brocklin v. Anderson*, 117 U. S. 151; 29 L. Ed. 845, it was held that lands situated in a state which were acquired by the United States through sales for direct taxes levied pursuant to an Act of Congress, are not subject to state taxation while so owned by the United States.

Here the sovereign power exercised was the power delegated to the United States to levy and collect taxes and it was in the exercise of that power that the land was acquired and held.

In many of the cases cited in the *Van Brocklin* case the lands sought to be taxed were public lands of the United States owned by it in its sovereign capacity. And so in many of the other cases the land was owned by the United States for use as a post office, a mint. The principle of those cases is that in the field of the sovereign and exclusive powers of the Federal government its exercise thereof is not and may not be impeded, limited or restricted by the

action of the state in the exercise of its sovereign power to tax lands within its territorial limits. Such cases hold consistently with the doctrine herein urged, that the Federal government within the field of its sovereign and exclusive sovereignty is not limited by or subject to the sovereign power of the states, but is supreme. We have not been able to examine all of the cases on this subject, but all that we have thus far examined are cases in which the Federal government was in the exercise of a sole and exclusive sovereignty and for that reason and upon that ground the property was held immune from taxation.

The case here is quite otherwise. It is contended here only that the Federal government may not exercise the authority to acquire land conferred upon it by such acts of Congress referred to, so as to cut down and take away from the state the sovereign power vested in it and which it has already exercised, to subject lands in the state to taxation.

We respectfully submit that in the acquisition of land and buildings for the purpose of providing low cost housing and effecting slum clearance, the Government is not exercising a delegated sovereign power, express or implied. The Constitution was intended to preserve and protect the sovereign powers of the United States and the states respectively. The doctrine of the immunity of one sovereignty from taxation by another is a necessary concomitant of this system of dual sovereignties; necessary to the protection of each, for as was said in the *McCulloch* case and reiterated in many cases since, "the power to tax is the power to destroy." However, if it be held that the authority exercised in the circumstances of this case is a sovereign power of the Federal government and that the land and buildings acquired by it in pursuance thereof are thereby withdrawn and excluded from the exercise by the state with respect thereto of its sovereign right to levy taxes, then we must take account of the effect of another prin-

ciple, to-wit: That the power to exclude the state from the exercise of its taxing power, is the power to destroy the state. And thus we have the paradox that the very thing sought to be withheld from the Federal government by the provision of the Constitution—the power to destroy the state—has been conferred upon it.

Mr. Justice Stone in his opinion in *Helvering v. Gerhardt*, 304 U. S. 405, 414, in commenting on the case of *Buffington v. Day*, 11 Wall. 113, 20 L. Ed. 122, in which the salary of a state officer was held to be immune from Federal income tax, used language which we believe to be entirely applicable to this case, as follows:

> "The question there presented to the Court was not one of interference with a granted power in a field in which the Federal government is supreme, but a limitation by implication upon the granted Federal power to tax. In recognizing that implication for the first time, the Court was concerned with the continued existence of the states as governmental entities, and their preservation from destruction by the national taxing power. The immunity which it implied was sustained only because it was one deemed necessary to protect the states from destruction by the Federal taxation of those governmental functions which they were exercising when the Constitution was adopted and which were essential to their continued existence."

The evils arising from the exercise of this authority by the government in the acquisition of lands and buildings and stores in connection therewith to minister to the needs of the inhabitants, and withdrawing them from the operation of the states taxing laws, are matters of common knowledge and of serious moment. Communities have had hundreds and thousands of families thrust upon them with the necessity of supplying them with all the customary services necessary to live in large communities, such as sanitary systems, water systems, fire protection, police protection and all the numerous public services and facilities

such as the provision of health and nursing service, poor relief, parks, playgrounds, libraries, the maintenance of streets and street lighting, and all the protection, benefits and privileges accruing from the powers of the state. All these services are community paid for in large part out of revenues derived from taxes levied on the premises occupied by the inhabitants of the community. Would the sovereignty of the United States be impaired or its means of functioning in this capacity, if it choose to do so, be unreasonably impeded, by subjecting such lands and buildings to the same rate of taxation as other properties in the community?

The evils arising from slum conditions and unsanitary and unhealthful housing are grave. It is desirable that they be eliminated, if possible, by providing proper housing. But it will not we are sure be urged for one moment that they are in their nature, matters which are beyond the power of the separate states to relieve so far as they exist within their own borders. Within their respective jurisdiction the states have as much power to provide a remedy as the Federal government and the same remedy. The acts of Congress under discussion themselves recognize the sufficiency of the sovereign power of the states in this matter by providing for Federal financial grants and loans in aid of such projects carried on by public housing agencies created by the states, and for the operation of such Federal projects by public housing agencies so created. Grants or loans in aid are a familiar method used by the Federal government to aid the states in numerous matters, such as roads and schools and other activities, and are not in any sense confined to the realms in which the Federal Government is supreme. Indeed legislation of the same general character and to reach the same evils has been enacted by the several states, and in some cases before the Federal government acted, notably Massachusetts which amended its Constitution in 1915 so as to confer power on its legisla-

ture to provide therefor. So that we say this power to provide low cost housing and slum clearance is one which may be concurrently and independently exercised by the Federal government and the states.

If, however, in the exercise of such power the Federal government substantially cripples and destroys the powers of the local government by the curtailment and destruction of the sovereign power of the state to levy taxes, it likewise destroys the power of the state to itself remedy the conditions giving rise to the evil.

In the application of the principle here urged no right is claimed, nor do we think the principle urged admits of it, to tax the assets of the Federal Public Housing Authority other than the land and buildings. Likewise the application of this principle would not permit taxation by the state of the assets of such Federal instrumentalities as the Home Owners' Loan Corporation of the Reconstruction Finance Corporation or the Federal Land Banks, which too are instrumentalities designed to promote the general welfare. The assets of these corporations other than lands acquired by them in the states would not come within the application of the rule contended for because the operation of such instrumentalities in the pursuit of their functions does not result in the cutting down of the sovereignty of the state or in the taking away from the state, its sovereign power with respect to taxation. The assets of such corporations other than the land acquired by them, consisting, it is to be assumed, of funds appropriated to the use of the several instrumentalities from the tax revenues of the United States, are funds and properties of the sovereign power of the United States and, therefore, never were and never can become subject to the sovereign power of the state. For that reason the denial of the power to tax such property is no infringement upon the sovereign power of the state. And even though such instrumentalities translate such funds into mortgage loans or other securities,

such mortgages or securities thus acquired with the funds appropriated to the use of the instrumentality by the Federal government, have never been the subject of the taxing power of the state, nor could be, and therefore the holding of them immune from taxation constitutes no infringement upon the sovereignty of the states. *Pittman vs. Home Owners' Loan Corp.*, 308 U. S. 21, 60 S. Ct. 15, 84 L. Ed. 11.

Respecting the Provision in the Act of Congress That Property Acquired for Low Cost Housing and Slum Clearance Shall be Exempt From Taxation by the States.

We have thus far given no consideration to the contention made by plaintiff that the acts of Congress under consideration expressly provide that the property and lands of the Housing Authority shall be exempt from taxation by the states and that such acts were effective for that purpose.

The basis of this argument must be that the Federal government is possessed of two distinct powers with respect to immunity or exemption from taxation of property owned by it, first, its immunity arising as an attribute of its sovereignty, and second, its exemption derived from the declaration of Congress to that effect.

We believe this argument is sufficiently answered by saying that if, as plaintiff argues in its brief, immunity attaches to all property owned by the Federal government or its instrumentalities, regardless of the nature of the power exercised in the ownership thereof, that manifestly any act of Congress on that subject would be merely declaratory of the immunity and not the occasion of it.

We submit Congress is without power to exempt property of the Federal government from taxation by the states. Nor can there be any need or occasion for its having or exercising such power, since immunity from taxation is of the essence of sovereignty and an attribute thereof. To

say that Congress can confer immunity, is tantamount to saying that Congress has power to confer sovereignty.

Congress may however submit property of the Federal government to taxation by the states and has done so. Similarly Congress has in many acts declared that property acquired in pursuance thereof shall be immune from taxation by the states. Such acts, it seems to us, are but declarations by Congress that such property is the property of the sovereign and so entitled to exemption, and further expressing its determination that such immunity shall not be waived.

If therefore this Court sustains our contention that the lands in question were not acquired and used in the exercise of sovereignty and hence are not immune from taxation, the declaration of Congress respecting immunity is without effect.

We respectfully submit that the Court below erred in holding the land exempt from taxation and the tax levies void.

Would the Land in Controversy be Taxable Even if the Federal Housing Act of 1937 Were Unconstitutional?

This memorandum is submitted upon the Court's suggestion that the question above stated be discussed by counsel in their briefs.

It seems to us the answer to this question must be found in the determination of this Court on appellants' fundamental contention in this case that it is only when land is acquired or used by the Federal government in the exercise of its sovereign power that it draws to it immunity from taxation by the State.

If the Housing Act is held to be unconstitutional because the Constitution vests no power in Congress to confer upon the executive branch of the government authority to acquire and improve lands for low cost housing and

im clearance, the unlawful and unauthorized acquisition the land cannot have the effect of suspending the right the State to tax the land. Were it otherwise, the legal fect of the exercise by the Federal government of a power hich was not conferred upon it, would be the same as that hich resulted from a constitutional exercise of power. The fference between constitutionality and unconstitutionality ould have vanished. We do not see room for any other nclusions so long as the Federal government holds the nd for such use and such purpose. When however the overnment departs from such unauthorized purpose and evotes the land to a purpose which constitutes the exerse of a sovereign power vested in it by the Constitution, s immunity from taxation by the State attaches.

Based upon these premises we submit as our conclusons on this subject the following:

1. Land owned by the Federal government acquired or used for, the exercise of a sovereign power, is immune from taxation by the State.

2. Land acquired by the Federal government in the xercise of a sovereign power but used for purposes unuthorized by the Constitution, does not thereby lose its mmunity from taxation by the State, because the unuthorized acts of the officers of the government cannot cut own or destroy its sovereignty.

3. Land owned by the Federal government but not equired or used in the exercise of a sovereign power, is not mmune from taxation by the State.

Respectfully submitted,

FRANK T. CULLITAN,
Prosecuting Attorney of
Cuyahoga County, Ohio,

And RALPH W. EDWARDS,

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Nos. 68 and 69

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE CITY OF CLEVELAND, APPELLANT

v.

THE UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY

JOHN J. BOYLE, COUNTY TREASURER OF CUYAHOGA COUNTY, JOHN A. ZANGERLE, COUNTY AUDITOR OF CUYAHOGA COUNTY, BOARD OF COUNTY COMMISSIONERS OF CUYAHOGA COUNTY, OHIO, APPELLANTS

v.

THE UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR APPELLEES

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In the Supreme Court of the United States

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No. 69

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v.

THE UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the court below (R. 15–21) is reported in 52 F. Supp. 906.

JURISDICTION

The judgment appealed from was entered November 19, 1943 (R. 24–26). The petitions for appeal were filed February 9, 1944. The jurisdiction of the three-judge district court was invoked by the United States under section 266 of the Judicial Code as amended, 28 U. S. C., sec. 380. The jurisdiction of this Court is invoked by the appellants under the same section.

QUESTIONS PRESENTED

1. Whether the present controversy is one cognizable under Section 266 of the Judicial Code.

2. Whether property acquired and used by the United States and its instrumentalities for low-cost housing purposes is immune from state taxation.

STATUTES INVOLVED

The statutes pertinent to the merits of the case are set forth in the brief for the appellant in No. 388, *Federal Public Housing Authority* v. *Guckenberger*. Section 266 of the Judicial Code, 28 U. S. C. sec. 380, and the Ohio statutory provisions which are pertinent on the jurisdictional question are set forth in the Appendix, *infra*, pp. 19–33.

STATEMENT

Sections 202 and 203 of Title II of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 201, 40 U. S. C. secs. 402, 403—"with a view

to increasing employment quickly"—authorized the Federal Emergency Administrator of Public Works to expend moneys for the construction of low-cost housing and slum clearance projects. The Act further authorized the acquisition of the necessary lands by purchase or condemnation. Pursuant to these provisions, the United States in 1934 and 1935 condemned certain lands in Cuyahoga County, Ohio, for the establishment of three low-cost housing projects—the Cedar Central Project, the Outhwaite Project, and the Lake View Terrace Project (R. 2–3, 12, 14, 22). Thereafter the United States constructed on the land so acquired buildings and structures needed in connection with these low-cost housing projects (R. 4, 8, 12, 14, 22).

In 1937 Congress established the United States Housing Authority,[1] a wholly owned Government corporation, and authorized the President to transfer to the newly created corporation any housing or slum clearance projects of existing federal agencies along with funds and personnel connected therewith. United States Housing Act of September 1, 1937, 50 Stat. 888, 42 U. S. C. secs. 1401, 1404 (d). The Act further provided that property of the corporation should "be exempt from all taxation now or hereafter imposed

[1] By Executive Order No. 9070, dated February 24, 1942, the name of the United States Housing Authority was changed to the Federal Public Housing Authority. 7 Fed. Reg. 1529, 1530.

by the United States or by any State, county, municipality, or local taxing authority." 42 U. S. C. sec. 1405 (e). The Authority was empowered, however, to enter into agreements to pay sums "in lieu of taxes." 42 U. S. C. sec. 1413 (c). Pursuant to that Act the President issued Executive Order No. 7732, dated October 27, 1937, transferring to the United States Housing Authority all of the activities, rights, title and interests held by the Federal Emergency Administrator of Public Works in any housing or slum clearance projects constructed or in the process of construction on September 1, 1937, including the aforementioned projects in Cuyahoga County. Federal Register (1937), pt. 2, p. 2324 (R. 4, 22). Prior to 1940 the project was administered by the United States Housing Authority (R. 22, 14). On January 1, 1940, the property was leased for active management purposes to the Cleveland Metropolitan Housing Authority, a state housing agency organized under the State Housing Authority Law of Ohio (R. 4, 8, 22). Ohio General Code, secs. 1078–29ff. The lease limits the use of the premises to the purpose of providing low rent housing accommodations to families of low income and provides for rentals commensurate with the achievement of that purpose (R. 22, 14).

The taxing officials of the County of Cuyahoga and the City of Cleveland have assessed taxes totalling $1,558,814.83 against these properties in

the name of the United States for the years 1935 to 1943, inclusive (R. 22–23, 14, 4–5). "The defendant, County Treasurer, intends to enforce the collection of the delinquent taxes appearing on the tax duplicate against the property by suit to foreclose the claimed tax liens. The defendant, County Auditor, intends to continue to assess and the defendants, City of Cleveland and Board of County Commissioners, intend to continue to levy real property taxes against the property in the future" (R. 14–15). These levies and assessments were made pursuant to the interpretation placed by these taxing officials on sections 5328 and 5625-3 of the Ohio General Code as applicable to the property in question. These sections provide that "all real property in this state shall be subject to taxation, except only such as may be expressly exempted thereform", and that "the taxing authority of each subdivision is hereby authorized to levy taxes annually * * * on the real and personal property within the subdivision."[2] The taxing officials had accepted payments tendered by the United States and the Cleveland Metropolitan Housing Authority "in lieu of taxes" for the years 1937 through 1942 (R. 14, 23). In 1943 the County rescinded its part in these agreements (*ibid.*)

This proceeding was accordingly brought by the United States and the Federal Public Hous-

[2] This construction of the Ohio law as applicable to federal housing projects was confirmed by the subsequent opinion of the Ohio Supreme Court in the *Guckenberger* case, No. 388.

ing Authority to enjoin the County Treasurer of Cuyahoga County, the County Auditor of Cuyahoga County, the Board of County Commissioners of Cuyahoga County, and the City of Cleveland from collecting the taxes thus assessed (through sale or otherwise), to prevent future assessments, and to invalidate past assessments on the ground that the laws of Ohio, interpreted as applicable to the property of the United States, contravened the Constitution of the United States. (R. 1–6). Plaintiffs requested that a three-judge court be convened and that a temporary injunction issue in accordance with the provisions of Section 266 of the Judicial Code, 28 U. S. C. § 380 (R. 6, 7).

In due course the matter came on for hearing before a statutory three-judge court, the material facts set forth above having been either admitted in the answers (R. 7–11, 11–13) or in the stipulation as to certain facts filed by the parties (R. 14–15). The court entered findings of fact (R. 22–23) and granted the United States the relief requested (R. 25–26). All three judges agreed that the controversy was one cognizable under Section 266 of the Judicial Code (R. 15), but one judge dissented on the ground that the lands were not acquired and held for a governmental function (R. 20–21).

The defendants have appealed to this Court. On May 22, 1944, this Court entered the following order (R. 38):

* * * further consideration of the question of jurisdiction of this Court is postponed to the hearing of the cases on the merits.

Counsel are requested to discuss in their briefs and on oral argument the questions (1) whether sec. 266 of the Judicial Code is properly applicable to these cases so as to give this Court jurisdiction of the appeals (compare, e. g., *Ex parte Public National Bank*, 278 U. S. 101, and *Rorick* v. *Commissioners*, 307 U. S. 208, with *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89); and (2) whether the land in controversy would be taxable even if the Federal Housing Act of 1937 were unconstitutional.

SUMMARY OF ARGUMENT

The case presents the same question as is considered in the brief for the Federal Public Housing Authority in No. 388, namely, whether land owned by the United States and used for low-rent housing purposes is taxable by the state. The only difference is that here the land was obtained by condemnation instead of purchase. But inasmuch as the title of the United States is conceded, the method of obtaining it is immaterial.

The present case comes within Section 266 of the Judicial Code. The state law involved is state-wide in effect, being a general taxing stat-

ute. The officials involved, though locally chosen, were acting as officers of the state since they were subject to the direction of state officials, were collecting taxes for the benefit and use of the state as well as of the localities, and were enforcing a policy of state-wide concern.

ARGUMENT

On the merits this case involves precisely the same question as No. 388, *Federal Public Housing Authority* v. *Guckenberger*, whether a state may tax land owned by the United States used for slum clearance and low-rent housing purposes. The Court is respectfully referred to the Government's brief in No. 388 for a discussion of that problem.

The only difference between the cases is that in No. 388 the United States acquired the land by purchase, whereas here the land was obtained by condemnation. This is immaterial, inasmuch as the title to the land in either instance is concededly in the United States (R. 14). As in No. 388, the taxes were assessed against the property in the name of "The United States of America" (*ibid.*).

The title obtained by condemnation is valid even if it be assumed for purposes of argument that the Housing Act and its predecessor are unconstitutional, or that the latter could not validly have vested the United States with power to con-

demn for general welfare purposes.[3] An unconsitutional statute is not a nullity. For the reasons pointed out in our brief in No. 388, pp. 52–56, titles obtained even pursuant to unconstitutional statutory authority cannot be treated as void.

In addition to the reasons urged in that brief, it is significant that a condemnation award is a judgment, and that a judgment even under an unconstitutional law is binding. *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371. Any contention here based on the alleged validity of the underlying statute would be a collateral attack on the adjudication of the condemnation court. 1 Freeman on Judgments (5th ed., 1925), pp. 607–608. The validity of such a judgment is not subject to collateral attack unless the judgment is void, as it might be if the court which entered it had no jurisdiction over the subject matter. But the court would not have lacked such jurisdiction even though the statute authorizing the condemnation were invalid. *Chicot County* case, *supra*; *United States* v. *Nudelman*, 104 F. (2d) 549, 551–552 (C. C. A. 7), certiorari denied, 308 U. S. 589. In the lat-

[3] The brief for the Government in *State of Oklahoma* v. *Guy F. Atkinson Co. et al.*, October Term, 1940, No. 872, pp. 60–69, contains a discussion of the right of the United States to condemn when acting under the general welfare clause. This Court did not find it necessary to pass upon the question. 313 U. S. 508.

ter case the Circuit Court of Appeals said (p. 552):

> Defendant confuses jurisdiction of the court with authority of the United States to acquire the land in question for the declared purpose. By act of Congress the United States District Courts of the district wherein real estate is located, which is the subject of proposed condemnation proceedings, have jurisdiction of proceedings for such condemnation. * * * Obviously, the owner of any land or interest therein, which the United States is seeking to acquire by condemnation, has a good defense if the congressional authorization for the taking for the declared use is invalid. But the existence of such defense does not go to the jurisdiction of the District Court in which the proceeding is pending. Such defense must be pleaded timely the same as any other defense. The jurisdiction of the District Court in the instant suit over the condemnation proceedings is not conferred by the act which authorizes the agency to provide for low-cost housing and slum-clearance projects. Invalidity of the latter act would vitiate the authority of the designated governmental agency to institute and prosecute proceedings for condemnation of the land for the declared purposes; but such invalidity could not destroy the jurisdiction of the District Court to entertain and adjudicate the condemnation proceedings.

Furthermore, an examination of the condemnation proceedings by which the present lands were acquired in 1934 and 1935 show that the city, county and state were named as parties defendant.[4] They had an opportunity to raise the constitutional issues at that time. Their failure to interpose any objections to the taking renders the issue of the Government's right to condemn *res judicata* as to them.[5]

We do not suggest that appellants are attacking the Government's title in this proceeding. On the contrary, the assessment against the United States assumes that the Government has the title. It is thus plainly of no consequence here how title was obtained.

If, as seems plain, the title to the property was in the United States, the state may not tax the property. See the Government's brief in No. 388.

THE QUESTION OF JURISDICTION UNDER SECTION 266 OF THE JUDICIAL CODE.

Section 266 of the Judicial Code, 28 U. S. C. § 380, so far as pertinent, provides that "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execu-

[4] The cases are cited at R. 3. The county was made a party in all 8 proceedings, the city in 5, and the state in 3.

[5] A judgment binding on the city, county or state would be binding on their officers. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 403.

tion of such statute" shall be issued except by a court of three judges. This Court has requested that the parties discuss the application of Section 266, and the decisions cited in the Court's order indicate that the issues to be considered are (1) whether these cases involve a "statute of a State" within the meaning of the Section, and (2) whether the action sought to be restrained is that of "any officer of such State." All the other requisites of Section 266 would seem unquestionably to be present.

(1) It has frequently been held that Section 266 does not apply to local ordinances (*Ex Parte Collins*, 277 U. S. 565; *Ex Parte Public National Bank*, 278 U. S. 101), and *Rorick* v. *Board of Commissioners*, 307 U. S. 208, holds that it does not reach a state statute of purely local application. The present cases, however, involve a state law which is state-wide in scope and application.

Section 5328 of the Ohio General Code provides that:

> All real property in this state shall be subject to taxation except only such as may be expressly exempted therefrom. * * *

Section 5351 declares that:

> Real or personal property belonging exclusively to the state or United States, and public property used for a public purpose shall be exempt from taxation.

In the *Guckenberger* case (No. 388), from Cincinnati, the Ohio Supreme Court construed this

exemption as not reaching property belonging to the United States and used for low-rent housing purposes, thereby rendering the property taxable under Section 5328. Section 5570–1 requires the county auditor to list all exempt property, and empowers the Board of Tax Appeals of the State alone to revise the list; the auditor is required to follow the orders of the Board.

This statutory scheme is clearly state-wide. It applies to the entire state and is administered by a single State agency. The fact that cases are now pending in this Court both from Cuyahoga County and Hamilton County under the same state statute is an indication that the Ohio law involved is not of mere local application.

(2) *Ex Parte Collins*, 277 U. S. 565, and *Ex Parte Public National Bank*, 278 U. S. 101, hold that even a State law of general application may not be assailed under Section 266 if the proceeding is against a local official acting in behalf of his locality and not as an officer of the State. In the *Public Bank* case, this principle was applied to a proceeding against city tax collectors "having no state functions to perform, but charged only with the duty of collecting and receiving taxes assessed by other city officials in no respect for the use of the state but for and in behalf of the city alone" (278 U. S., at 104).

In *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, however, this Court held that the above authorities did not preclude a suit under Section 266

against a locally elected district attorney, inasmuch as his duty was to enforce state laws in the interest of the state and not merely of the locality. And in *Rorick* v. *Board of Commissioners*, 307 U. S. 208, 212, the Court stated that:

> An official though localized by his geographic activities and the mode of his selection may, when he enforces a statute which "embodies a policy of statewide concern", be performing a state function within the meaning of § 266.

We think that the county auditor and the county treasurer were not acting merely in a local capacity in attempting to collect the taxes involved in this case. In the first place, as already noted, insofar as the granting or denial of exemptions is concerned, the Ohio law (Ohio General Code, Sec. 5570–1) expressly declares that "the county auditor shall follow the orders of the board of tax appeals." Only the Board has statutory power to exempt property from taxation (*ibid.*).[6] Furmore, Section 5579 provides that—

> In addition to all other powers and duties vested in or imposed upon it by law, the tax commission of Ohio [now the board of tax appeals][7] shall direct and supervise

[6] The Ohio Supreme Court has so held in *State ex rel. Bartlett* v. *Thatcher*, 138 Ohio St. 235, 34 N. E. 2d 440 (1941); *State ex rel. Methodist Book Concern* v. *Guckenberger*, 133 Ohio St. 373, 14 N. E. 2d 9 (1938).

[7] The Tax Commission has since been replaced by the Board of Tax Appeals and the Tax Commissioner (Ohio General Code, Sec. 1464, quoted in appellant's brief in No. 388, p. 63).

> the assessment for taxation of all real property in the state. County auditors shall, under the direction and supervision of the tax commission of Ohio, be the chief assessing officers of their respective counties, and, shall list and value real property for taxation, within and for their respective counties, except as may be otherwise provided by law. * * *

Inasmuch as the Board is a state agency, to the extent that the auditor is subject to its directions, he is acting as an officer of the state.

Under Ohio law it also appears that the county treasurer acts on behalf of the state in collecting taxes. Upon failure to pay taxes, *the state* shall have the right to institute foreclosure proceedings (Section 5713), which shall be brought by the prosecuting attorney of the county "in the name of the county treasurer" to foreclose the lien of the state (Section 5718–3). Delinquent land not sold on foreclosure shall be forfeited to the state (Section 5744). The entry of land on the tax lists as delinquent is to be notice "of the prior right and lien of the state" (Section 5714). With respect to lands charged as forfeited or certified as delinquent, "it shall not be necessary to make the state a party, but it shall be deemed a party through, and represented by the county treasurer" (Sections 2670, 5719). The Ohio Supreme Court has held a suit for taxes by the county treasurer to be an action on behalf of the State; in *Wasteney*

v. *Schott*, 58 Ohio St. 410, 51 N. E. 34 (1898), that court said (pp. 415–416):

> * * * the courts will take notice that general taxes levied by the state directly, or through local agencies to which it has delegated that power, constitute a source of revenue for use in the due performance of the functions of the state government. Whether voluntarily paid, or collected by suit, they go partly to the general funds of the state for its disbursement in the administration of public affairs, and are in part disbursed in the due course of local administration by officers exercising the delegated powers of the state, deemed necessary and proper for that purpose. In the latter case, as well as the former, the fund belongs to the state's revenues, and the disbursement is for the public benefit, although local advantages may also result. Through county, township, municipal, and other organizations, they are paid out in the administration of public justice, the maintenance of the public order and security, the support of the public schools, and other purposes of a public nature pertaining to the state government. Hence, for all such taxes levied on real property the lien thereon provided by statute is declared to be in favor of the state; * * *

In the second place, the taxes collected by these officials are not "for the sole use of the city" (278 U. S. at 102), as they were in the *Public Bank* case. Section 5625–3 of the Ohio General

Code provides that the proceeds of taxes levied "by or for any subdivision when received by the fiscal officer thereof shall be deposited in its treasury to the credit of the appropriate fund." Under Section 2688, the county treasurer is required "to pay into the state treasury, on the warrant of the State auditor, the full amount of all sums found by the auditor of state, on an examination of the duplicate settlement sheets sent to him by the county auditor, to belong to the state." For example, a portion of the taxes are payable to the state public audit expense fund (sections 274, 287), and to the state public insurance fund (sections 1465–66).[8] With respect to funds paid in redemption of forfeited land, the county auditor is to specify "the proportion of such money belonging to the state * * * and the county treasurer shall pay into the state treasury the states' proportion of such money, at the time he pays the other taxes due the state" (Section 5747). Thus a part of the taxes in question are actually levied and collected for the use and benefit of the state, which distinguishes the present controversy from the *Public Bank* case.

---

[8] The budgets of the County of Cuyahoga and the City of Cleveland for the year 1943 show appropriations made by these taxing units to pay their obligations to the State of Ohio. See County of Cuyahoga, Budget and Appropriation Report for 1943, p. 48; The City Record (official publication of the City of Cleveland) Supp., Feb. 10, 1943, p. 8.

Inasmuch as the county auditor and county treasurer are subordinate officials of the state department of taxation, acting for the benefit of the state and not merely for the local community, in the enforcement of a state law embodying "a policy of statewide concern", we believe that they are officers of the state within the meaning of Section 266.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be affirmed.

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NOVEMBER 1944.

APPENDIX A

SECTION 266, JUDICIAL CODE

Section 266 of the Judicial Code as amended, 28 U. S. C. sec. 380 provides:

> SAME: ALLEGED UNCONSTITUTIONALITY OF STATE STATUTES; APPEAL TO SUPREME COURT
>
> No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a ma-

jority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however*, That one of such three judges shall be a justice of the Supreme Court or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided*, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been

brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.

APPENDIX B

Pertinent Provisions of the Ohio General Code (Baldwin 1940 ed. and 1942 Supp.)

Section 274:

Bureau of Inspection of Public Offices; Powers and Duties.—There shall be a bureau of inspection and supervision of public offices in the department of auditor of state which shall have power as hereinafter provided in sections two hundred seventy-five to two hundred eighty-nine, inclusive, to inspect and supervise the accounts and reports of all state offices, including every state educational, benevolent, penal and reformatory institution, public institution and the offices of each taxing district or public institution in the state of Ohio. Said bureau shall have the power to examine the accounts of every private institution, association, board or corporation receiving public money for its use and purpose, and may require of them annual reports in such form as it may prescribe. The expense of such examination shall be borne by the taxing district providing such public money. By virtue of his office the auditor of state shall be chief inspector and supervisor of public offices, and as such appoint not exceeding two deputy inspectors and supervisors, and a clerk. No more than one deputy inspector and supervisor shall belong to the same political party.

Section 287:

EXPENSES OF BUREAU; HOW BORNE; DUTIES OF AUDITOR OF STATE.—The necessary expenses of the maintenance and operation of the bureau of inspection and supervision and the total amount of compensation paid state examiners and assistant state examiners in excess of the amount borne by the taxing districts shall be borne by the several counties in proportion to their population at the preceding federal census; provided that the total amount of all such expenses shall not exceed in the aggregate the sum of one hundred and twenty thousand dollars per annum. The auditor of state shall draw on the treasurer of each county for its proportion of such expenses and the county treasurer shall pay such amount from the general revenue fund of the county semi-annually during the months of June and December. All moneys received by the auditor of state for the maintenance and operation of the bureau, shall be paid into the state treasury to the credit of the bureau of inspection and supervision fund, and all moneys received by the auditor of state for the compensation of state examiners and assistant state examiners shall be paid into the state treasury to the credit of the public audit expense fund.

Section 1465–66:

ANNUAL PAYMENT BY COUNTY TO CREDIT OF FUND; PUBLIC INSTITUTIONS TO MAKE REPORT TO COMMISSION.—Each county auditor, immediately following receipt of the certificate mentioned in section 1465–65 shall issue his warrant in favor of the treasurer

of state of Ohio on the county treasurer of his county, for the aggregate amount due from such county, for such county and the taxing districts therein, to the public insurance fund, and the county treasurer shall pay the amount called for by such warrant from the county treasury, and the county auditor shall charge the amount so paid to the county itself and the several taxing districts therein as shown by such certificate; and the treasurer of state shall immediately upon receiving such money, convert the same into the public insurance fund.

In the case of a district activity or institution mentioned in section 1465-63 the chief fiscal officer of such institution or activity shall transmit the reports to the industrial commission at the time and in the manner provided in section 1465-65, and shall upon receipt of the certificate of the amount due from such institution forthwith transmit to the treasurer of state the amount shown by such certificate.

Section 2670:

FINDING AND DECREE; APPRAISAL OF PROPERTY; DISTRIBUTION OF PROCEEDS.—A finding shall be entered of the amount of such assessments, or any part thereof, as are found due and unpaid, and for penalty and costs, for the payment of which the court shall order such premises to be sold without appraisement for not less than the total amount of such finding and costs, unless the county treasurer shall apply for an appraisal, in which event the premises shall be appraised in the manner provided by section 11672 of

the General Code, and shall be sold for at least two-thirds of the appraised value thereof. From the proceeds of the sale the costs shall be first paid, next the finding of the amount of assessments, and the balance shall be distributed according to law. No statute of limitations shall apply to such action. When the land or lots stand charged on the tax duplicate as forfeited to the state, it shall not be necessary to make the state a party, but it shall be deemed a party through and represented by the county treasurer.

Section 2688:

PAYMENT MADE BY COUNTY TREASURER TO STATE TREASURER, WHEN.—After he has made each settlement with the county auditor, the county treasurer shall pay into the state treasury, on the warrant of the state auditor, the full amount of all sums found by the auditor of state, on an examination of the duplicate settlement sheets sent to him by the county auditor, to belong to the state.

Section 5328:

PROPERTY TO BE ENTERED ON GENERAL TAX LIST AND DUPLICATE.—All real property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom. * * * All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property as prescribed in this title.

Section 5351:

STATE OR U. S. PROPERTY.—Real or personal property belonging exclusively to the state or United States, and public property used for a public purpose shall be exempt from taxation.

Section 5570–1:

COUNTY AUDITOR SHALL MAKE LIST OF EXEMPTED PROPERTY; CONTENTS OF LIST; CORRECTIONS; CONSENT OF BOARD OF TAX APPEALS; REVISIONS.—It shall be the duty of the county auditor to make a list of all the property, both real and personal, in his county, and including moneys, credits and investments in bonds, stocks, or otherwise, which is exempted from taxation under sections 3410–6, 4759, 5349, 5350, 5351, ~~5352, 5353,~~ 5353–1, 5356, 5357, 5359, 5361, 5362, 5363, 7915–1, 10093, 10101, 10105 and 10192 of the General Code. In each case in addition to the name of the owner, such list shall show the value of the property exempted and a statement in brief form of the reason for or ground on which such exemption has been granted. It shall be corrected annually by adding thereto such items of property as may have been exempted during the year and by striking therefrom such items as shall have lost their right of exemption and which shall be reentered on the taxable list. After this act takes effect no additions shall be made to such exempt lists nor additional items of property exempted under any of the sections enumerated herein without the consent of the board of tax appeals, but when any personal property or endowment fund of an institution has once been held by the board of tax

appeals to be properly exempt from taxation, it shall not be necessary to obtain the board's consent to the exemption of additional property or investments of the same kind belonging to the same institution; but such property shall appear on the abstract filed annually with the board. The board of tax appeals shall, prior to January 1, 1942, revise the list in every county so that no property is improperly or illegally exempted from taxation; and shall have power to make further revisions at any time thereafter. The county auditor shall follow the orders of the board of tax appeals given under this section. An abstract of such list shall be filed annually with such board on a form to be approved by it, and a copy thereof shall be kept on file in the office of each county auditor for public inspection. *The board of tax appeals shall not consider an application for exemption of property under any of the sections enumerated herein unless the application has attached thereto a certificate or affidavit executed by the county treasurer certifying that taxes, assessments, penalties and interest levied and assessed against the property sought to be exempted have been paid in full to the date upon which the application for exemption is filed.*

Provided, however, that taxes, penalties and interest which have accrued after the property began its use for the exempt purpose but in no case prior to the date of acquisition of the title to said property by applicant, may be remitted by the county auditor, with the consent of the board of tax appeals.[1]

[1] The above italics have been supplied and denote an amendment to this section under an act effective August 21, 1941.

Section 5579:

TAX COMMISSION SHALL DIRECT AND SUPERVISE ASSESSMENT OF REAL PROPERTY; ASSESSING OFFICERS; COUNTY BOARD OF REVISION.—In addition to all other powers and duties vested in or imposed upon it by law, the tax commission of Ohio shall direct and supervise the assessment for taxation of all real property in the state. County auditors shall, under the direction and supervision of the tax commission of Ohio, be the chief assessing officers of their respective counties, and, shall list and value real property for taxation, within and for their respective counties, except as may be otherwise provided by law. There shall also be in each county, a board to hear complaints and revise assessments of real property for taxation, which shall be known as the county board of revision.

Section 5625-3:

AUTHORIZED TO LEVY TAXES.—The taxing authority of each subdivision is hereby authorized to levy taxes annually, subject to the limitations and restrictions of this act, on the real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and the acquisition or construction of permanent improvements. The taxing authority of each subdivision and taxing unit shall, subject to the limitations and restrictions of this act, levy such taxes annually as are necessary to pay the interest and sinking fund on and retire at maturity the bonds, notes and certificates of indebtedness of such subdivision and taxing unit including levies in anticipation of which the subdivision or taxing unit has incurred

indebtedness All taxes levied on property shall be extended on the tax duplicate by the county auditor of the county in which the property is located, and shall be collected by the county treasurer of such county in the same manner and under the same laws, rules and regulations as are prescribed for the assessment and collection of county taxes. The proceeds of any tax levied by or for any subdivision when received by the fiscal officer thereof shall be deposited in its treasury to the credit of the appropriate fund.

Section 5713:

STATE SHALL HAVE FIRST LIEN; FORECLOSURE PROCEEDINGS, WHEN INSTITUTED; COSTS; PARTIAL PAYMENT OF DELINQUENT TAXES PERMITTED.—The state shall have a first and best lien on the lands and lots described in the delinquent land list, for the amount of taxes, assessments and penalty and accrued interest charged prior to the delivery of such list, together with interest on the principal sum of such taxes and assessments at the rate of eight per cent per annum, from the date of the August settlement next preceding the delivery of such list to the date of redemption thereof, and the additional charge of twenty-five cents for the making of said list. If the taxes have not been paid for three consecutive years after certification, the state shall have the right to institute foreclosure proceedings thereon, in the manner provided by this chapter, and there shall be taxed by the court as costs in the foreclosure proceedings instituted on said certification,

the cost of an abstract or certificate of title to the property described in said certification, if the same be required by the court, to be paid into the general fund of the county. Nothing in this chapter shall be so construed as to forbid or prevent the partial payment of such delinquent taxes, assessments and penalty, during said period of three years, but such partial payments may be made and received as provided by law without prejudice to the right of the state to institute foreclosure proceedings at the end of said period for any amount then remaining unpaid.

Section 5714:

ENTRY "DELINQUENT" DEEMED NOTICE TO PURCHASERS.—The county auditor shall enter upon the county auditor's tax list and treasurer's duplicate, showing such lands delinquent, the word "delinquent," and such entry on said tax list and duplicate shall be deemed and taken to be notice to all purchasers or other persons acquiring any right, title or interest in or to the land pertinent to which such entry is made, of the prior right and lien of the state under the provisions of this chapter.

Section 5718-3:

PROCEEDINGS TO FORECLOSE LIEN OF STATE, HOW INSTITUTED AND PROSECUTED; FORFEITURE AND SALE OF LANDS; PETITION; DECREE.—It shall be the duty of the prosecuting attorney of the county, except as hereinafter provided, upon the delivery to him by the county auditor of a delinquent land tax certificate, to institute a proceeding thereon in the name of the county treasurer to foreclose the lien of the state, in any court of competent

jurisdiction within nine months thereafter unless the taxes, assessments, penalty, interest and charges are sooner paid, and to prosecute the same to final judgment and satisfaction. * * *

Section 5719:

FINDING; APPRAISEMENT AND SALE; DISTRIBUTION OF PROCEEDS; RIGHT OF DOWER BARRED.—A finding shall be entered of the amount of such taxes and assessments, or any part thereof, as are found due and unpaid, and of penalty, interest, costs and charges, for the payment of which, together with all taxes and assessments payable subsequent to certification for foreclosure, the court shall order such premises to be sold without appraisement for not less than the total amount of such finding and costs, unless the prosecuting attorney shall apply for an appraisal, in which event the premises shall be appraised in the manner provided by section 11672 of the General Code, and shall be sold for at least two-thirds of the appraised value thereof. * * * From the proceeds of the sale the cost shall be first paid, next the amount found due for taxes, assessments, penalties, interest and charges, next the amount of any taxes and assessments accruing after the entry of the finding and before sale, all of which taxes, assessments, penalties, interest and charges shall be deemed satisfied, though the amount applicable thereto be deficient, and the balance, if any, shall be distributed according to law. Upon confirmation of the sale a husband or wife of the party charged with the delinquent tax shall thereby be barred of the right of dower in the property sold, though such husband or wife was not a

party to the action. No statute of limitations shall apply to such action. When the land or lots stand charged on the tax duplicate as certified delinquent, it shall not be necessary to make the state a party, but it shall be deemed a party through, and represented by the county treasurer.

Section 5744:

LANDS NOT SOLD FORFEITED TO STATE.—Every tract of land and town lot offered for sale in foreclosure proceedings, as provided in the next preceding chapter, and not sold for want of bidders, and every tract of land and town lot omitted from foreclosure proceedings and duly advertised as provided in this chapter shall be forfeited to the state. Thenceforth all the right, title, claim, and interest of the former owner or owners thereof, shall be considered as transferred to, and vested in, the state, to be disposed of as the General Assembly may direct.

Section 5747:

TREASURER CHARGED WITH MONEYS RECEIVED ON FORFEITED LANDS; REPORT THEREON TO AUDITOR OF STATE.—The county auditor shall charge the county treasurer with all moneys by him received under the provisions of the next preceding section and make out an annual list of lands and town lots, upon which payments have been so made, specifying therein the proportion of such money belonging to the state. He shall forward the list to the auditor of state, by the county treasurer, at the time of paying over the state tax, and the county treasurer shall pay into the state treasury the states' proportion of such money, at the time he pays the other taxes due the state.

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Supreme Court of the United States

OCTOBER TERM 1944.

No. 930 (1943-4 Docket)
Nos. 68-69 (1944-5 Docket)

JOHN J. BOYLE, COUNTY TREASURER OF CUYAHOGA COUNTY; JOHN A. ZANGERLE, COUNTY AUDITOR OF CUYAHOGA COUNTY, BOARD OF COUNTY COMMISSIONERS OF CUYAHOGA COUNTY, OHIO,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY.

BRIEF AMICUS CURIAE OF THE OHIO REAL ESTATE ASSOCIATION.

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INTRODUCTION

By the courtesy of Counsel for The United States of America, the Public Housing Authority and the Officials of Cuyahoga County, Ohio, in case 68, and of the City of

Cleveland in Case 69, we are permitted to submit for the consideration of the Court our views on the pending question.

The Ohio Real Estate Association is the cap sheaf, or binding blanket covering the individual Real Estate Boards of the various cities of Ohio. Its membership may be said to include all of the members of the local boards. Of these local boards, there are fifty-five whose members reside in seventy of the eighty-eight counties of Ohio.

Said Ohio Real Estate Association is a member of the National Association of Real Estate Boards, consisting of six hundred and fifty member boards, located in all of the larger cities of the forty-eight states.

The purposes of the Ohio Real Estate Association, and the National Association of Real Estate Boards, include the support of the General Welfare of Ohio, and the General Welfare of the Federal Government.

THE RELATIONSHIP OF THE STATE GOVERNMENT TO THE FEDERAL GOVERNMENT

The Ohio Real Estate Association believes firmly in the declared balance of power between the State Government and the Federal Government.

It believes that, in the interpretation of their respective powers, every presumption should be given its full weight to protect the sovereignty of both the State Government and the Federal Government.

As a correllary to this, we believe that any preference that is given to one Government that will place an undue restraint on the other, should be avoided.

In **Helwig vs. Gerhadt**, 304 U. S., 405, the court declared that:

> "• • • the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted."

LIMIT OF PROPERTY TAX IMMUNITY

In the early history of the United States, the Federal Government was the weaker entity, and the one to be protected.

However, even in the much quoted case of **McCulloch** vs. **Maryland**, 4 Wheat., 316, Chief Justice Marshall foresaw the possibility of that decision being interpreted beyond its intention and declared at page 436:

> "This opinion does not deprive the states of **any resources which they originally possessed.** It does not extend to a **tax paid by the real property of the bank, in common with the other real property within the state**, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state." (Emphasis ours.)

The prior homes of these project tenants were a resource to the State of Ohio. Immunity of their present homes from taxation, with the same service required, would remove said resources, which Chief Justice Marshall declared in **McCulloch** vs. **Maryland**, supra, would not be done:

The real estate would not then be taxed

> "in common with the other real property within the State."

In **Osborn vs. Bank of U. S.**, 9 Wheat., 867, it was declared:

> "It is true, that the property of the contractor may be taxed, as the property of the other citizens, and so may the local property of the bank." (A United States Agency.)

In **Bank vs. Commonwealth** (Ky.), 9 Wall., 353, the principle is affirmed that a state has the right to tax shares of a National Bank. Justice Miller declared at page 362:

> "That limitation is, that the agencies of the Federal Government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government."

In the scale of humanity served by the Housing Authority, the latter does not serve the pauper, nor the rich, but selects a segment of its choosing. To require its beneficiaries to pay taxes would, in the extreme case, only require the Housing Authority to change the minimum earning capacity of its beneficiaries to a point a bit further up the scale. The efficiency of the Housing Authority would in no way be impaired.

CONCURRENT RIGHTS OF TAXATION.

The Federal Government has the right to tax, and to protect its sovereignty, but nowhere is any right granted to deprive a state from protecting its sovereignty.

Story on the **Constitution**, Section 942:

> "* * * It may be admitted that a law laying a tax for the use of the United States would be supreme in its nature and legally uncontrollable. Yet a law abrogating a state tax or preventing its collection would be as clearly unconstitutional, and therefore not the supreme law."

To deprive a state of its right to tax any property, as distinguished from the Agency, would destroy State Sovereignty.

Story on the **Constitution**, Section 943:

> "Any separation of the subjects of revenue which could have been fallen upon would have amounted to a sacrifice of the interests of the Union to the power of the individual states, or of a surrender of important functions of the latter, which would have removed them to a mean provincial servitude and dependence."

TAXATION AN ATTRIBUTE OF SOVEREIGNTY

Sovereignty includes the power to tax, the power of eminent domain, and the police power. But the most essential of these is the power to tax, as, without the power to tax, all other powers are impotent. Every activity of the State must be supported by taxation. That power must be inviolate.

The children of those living in these projects cannot be educated without taxation. Conceivably, the school districts might be absorbed, or nearly so, in the projects, and no funds would be available.

Fire protection and police protection could not be furnished without tax revenue. Surely there is no provision in the Federal Constitution for the Federal Government to establish fire departments and police departments to protect projects inhabited solely by private citizens and their families, engaged in private business.

For the projects to offer and pay sums in lieu of taxes does not answer, as it is not then the State that is exercising Sovereignty, but the project is exercising Sovereignty over the State.

Fundamentally, the services of education, fire protection, police protection, etc., are not due the United States as a tax, as a military service is due, but they are for the benefit of residents of the project, just as to residents outside the projects, and are due from the Sovereign State to its subjects. That these subjects also receive benefits from another Sovereign—the United States—should not subordinate the State to the United States.

STATE TAXES

That the taxes in question are being collected by State officials for State purposes and in pursuance of State Sovereignty, must be conceded to justify consideration of this cause by the Three Judge Court that did hear the same.

Discussion of that question has been covered by appellants in their brief.

ARTICLE I SECTION VIII CLAUSE 1

In the brief of appellants, two schools are distinguished as to their interpretations of Article I, Section VIII, Clause 1. Appellants have quoted freely from **Story** on the **Constitution**, especially from sections 907 and 908.

We affirm our belief that Clause 1 is a taxing clause, and that it is exhausted when the taxes are collected and expended. We believe with Justice Story, (Sect. 908) that the clause should be interpreted as if the words "in order" were inserted and the clause read as follows:

> "* * * **In order** to pay the debts * * * and to provide for the * * * general welfare." (Boldface indicates words to be inserted.)

In the expenditure of these taxes supervision may be necessary, but such falls far short of the establishment and operation of a project that includes all the earmarks of a business. Going further, these projects are leased to non-federal management agencies. In the case in

question, the agency is a state agency whose property, used for the same purpose, would be taxable (**Columbus Metropolitan Housing Authority** vs. **Thatcher, Aud.**, 140 O. S., 38.)

Justice **Story** in his **Constitution** in Section 909 observes:

> "If the clause "to pay the debts and provide for the common defense, and general welfare of the United States" is construed to be an independent and substantive grant of power, it not only renders wholly unimportant and unnecessary the subsequent enumeration of specific powers, but it plainly extends far beyond them and creates a general authority in Congress to pass all laws which they may deem for the common defense or general welfare. Under such circumstances the Constitution would practically create an unlimited national government."

This interpretation by Justice Story is adopted by **Charles Warren** in **The Making of the Constitution**, page 476. At page 477 is added:

> "It is unnecessary to discuss this further, as Story's reasoning is everywhere now accepted."

AMENDMENT X TO CONSTITUTION OF THE UNITED STATES

If Article I Section VIII Clause 1 does in fact grant all the powers appropriate to provide for the General Welfare in its fullest interpretation, then Amendment X to the Federal Constitution and most of the other powers enumerated have no meaning and are surplusage.

Justice **Story** in his **Constitution** in Section 1908 speaking of Amendment X observes:

> "• • • Its sole design is to exclude any interpretation by which other powers should be assumed beyond those which are granted."

TAXATION BY A STATE

For many years the Supreme Court of the United States labored under the mistaken theory that a state income tax on Federal officials was a burden upon the Sovereignty of the Federal Government.

This was based on a misinterpretation of the reasoning in **McCulloch** vs. **Maryland**, supra.

In 1938, in the case of **Graves** vs. **New York**, 306 U. S., 466, prior decisions were overruled and the State of New York was declared within its rights in levying an income tax on an employee of the Home Owners' Loan Corporation.

Justice Frankfurter in a concurring opinion declared:

> "The arguments upon which **McCulloch vs. Maryland**, 4 Wheat. 316, rested had their roots in actuality. But the have been distorted by sterile refinements unrelated to affairs."

In **Northern Pacific vs. Myers**, 172 U. S., 589, title was in the United States, but tax liability to the State of Montana was recognized.

In **Thompson** vs. **Pacific**, 9 Wall., 579, exemption was claimed because of the employment of the corporation in the service of the government, but was denied, syllabus 2 declaring:

> "The point decided in **McCulloch vs. Maryland** does not establish a broader doctrine even if some of its reasoning may seem to do so."

Story in his **Constitution**, in discussing **McCulloch** vs. **Maryland**, supra, observes in Section 1052:

> "* * * But property, acquired by that corporation, (Bank of the United States) in a state, was supposed to be placed in the same condition with property acquired by an individual."

What was decided in **McCulloch v. Maryland**, supra, was that the franchises,—the entity,—the agency—could not be taxed, but does not declare that its physical property could not be taxed.

VAN BROCKLIN VS. TENNESSEE, 17 U. S., 151.

This case does not justify many of the inferences drawn from it.

The decision declares that land taken in payment of a tax due the United States shall not be taxed by a state.

This has been broadened to declare that all land taken or held by the United States in any manner, and for any purpose, shall be immune from state taxation.

Until the land taken for the tax is diverted to some particular use, it may still be considered as the tax. Instead of being greenbacks or gold, it is land. It is a form of exchange.

But, if that land is diverted to a use not authorized by the Constitution, or its immunity is not proper because of its use, it loses its caste, and should become subject to the burdens that are common to all property so used.

INSIDIOUS EFFECT OF IMMUNITY

This case is merely a test case. If immunity is established here, it will be used as a breach for a flood of other cases.

In Ohio, the value of Housing Authority property now exceeds sixty million dollars. Forty million dollars of other property has been aided or completely financed with Federal money. The title to much of this is now in a Federal Agency.

Should immunity be granted here, each of these projects will demand immunity. This will encourage other ventures by Federal Agencies to expand their holdings to the impoverishment of the State.

Already, the Laurel Homes project of Cincinnati, Ohio, has filed an appeal to this Court from a decision of the Supreme Court of Ohio, denying immunity. Their only ground for appeal is based on title.

In Ohio, all state housing projects have conveyed their millions of dollars of property to the Federal Public Housing Authority, anticipating a favorable decision in this case.

This transfer is a deliberate, unhidden subterfuge based on mere title in a Federal Agency, executed for no other purpose than to evade the decision of the Supreme Court of Ohio in the case of the **Columbus Metropolitan Housing Authority**, Appellent, vs. **Thatcher, Auditor**, et al., Appellees, 140 O. S., 38, wherein that court declared that Housing Authority property was tax-

able under Section 2, Article I of the **Constitution of Ohio**.

This Court should not aid this subterfuge.

THE POWER TO TAX IS THE POWER TO DESTROY.

We have seen that, without tax revenue, and with the obligation attaching to the state to furnish education, fire protection, police protection and many other services, the State will, as a Sovereign, be destroyed, should immunity from taxation be established and extended.

That the reverse of this could happen was resented by Justice Holmes in **Panhandle Oil Co.** vs. **Mississippi**, 277 U. S., 218, where he says of the dictum of Chief Justice Marshall in **McCulloch** vs. **Maryland**:

> "The power to tax is not the power to destroy while this court sits."

May we paraphrase this declaration by the question:

> "Will this court sit by and permit the destruction of the Sovereignty of Ohio by allowing immunity of physical property from taxation?"

GOVERNMENTAL AND PROPRIETARY FUNCTIONS

It has been asserted with confidence by counsel for the United States, that this property is not held by the Government as a proprietor, for the reason that:

> "the Federal Government exercises no proprietary powers, because it was not granted such powers by the Constitution." (page 12 in District Court brief).

We agree with this proposition, but therein lies the difficulty.

What happens when the Government has exceeded the powers granted in the Constitution?

Under the National Recovery Act, the site in question, and many other sites were acquired by the United States.

This Court declared that Act unconstitutional. What should be done with this and the other projects acquired before the act was declared unconstitutional?

Obviously, the continuance of these unconstitutional purposes cannot be Governmental. The United States cannot be a Proprietor. The result is an anomaly. That it is a Governmental function is a pure fiction. The project should be liquidated.

USE OF PROPERTY

Counsel for the United States in the District Court claimed that the use of the property should not be examined into by the Court, as it would lead to a multiplicity of suits. Their deduction is that all property, where the title is in a Federal Agency, regardless of use, should be immune without question.

This has no force except to declare that constitutional limitations should be disregarded, and all Federal activity be assumed conclusively to be within granted powers.

The statement of Judge Turner in the **Columbus Metropolitan Housing Authority** case, supra, at page 48, applies equally to the project here in question:

> "It seems to us clear that where dwellings are leased to family units for the purposes of private homes, the use of such dwellings is private and not public. Under Anglo-Saxon law and tradition, there is nothing more private than one's home. **Broom's Legal Maxims**, (9 Ed., 283; **Semayne's Case**, 5 Coke, 91, 77 Eng. Rep. R., 194. That every man's house is his castle has not yet been erased from our laws."

ENFORCEMENT OF TAX LIABILITY

It may be claimed that taxes could not be enforced against the Federal Government. Perhaps not against the Federal Government as such, but it might be enforced against the real estate, or the income of the real estate.

In the case of **Baltimore Dock Co. vs. Baltimore**, 195 U. S., 375, Justice Holmes stated at page 381:

> "It is true that commonly taxes on land create a lien paramount to all interests, and that a tax sale often has been said to extinguish all titles and to start a new one. * * *. But it needs no argument to show that a state may do less. It may tax a life estate to one, and a remainder to another, and sell only the interest of the party making default."

CONCLUSION

The Ohio Real Estate Association and the National Association of Real Estate Boards are firmly of the opinion that the Sovereignty of Ohio should be protected by this Court equally with the Sovereignty of the Federal Government.

To accomplish this, the Sovereign Power of Taxation must be preserved. As Chief Justice Marshall declared in **McCulloch vs. Maryland**, that decision does not, and we declare should not

> "* * * deprive the states of any resources which they originally possessed."

Real estate used for residence purposes, or in fact for any purpose, should bear taxes

"* * * in common with the other real property within the state."

Regardless of whether the Federal Government has the power to establish Housing Authority projects, and continue them as a Governmental function, their physical property should be taxable to the State of Ohio as other similar property in Ohio is taxable.

Such taxation is not a burden on the Sovereignty of the United States. Immunity from such taxation is a vital burden on the Sovereignty of the State of Ohio.

The decision of the special Three Judge Court under consideration should be reversed, the restraining order therein made should be dissolved, and the officials of Ohio be permitted to carry out their duties of collecting the taxes that are vital to the Sovereignty of Ohio.

Respectfully submitted,

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Counsel for the Ohio Real Estate Association.

SUPREME COURT OF THE UNITED STATES.

Nos. 68-69, 388.—October Term, 1944.

The City of Cleveland, Appellant, 68 *vs.* The United States of America and Federal Public Housing Authority. John J. Boyle, County Treasurer of Cuyahoga County, et al., Appellants. 69 *vs.* The United States of America and Federal Public Housing Authority.	Appeals from the District Court of the United States for the Northern District of Ohio.
Federal Public Housing Authority, formerly United States Housing Authority, Appellant, 388 *vs.* George Guckenberger, Auditor, Hamilton County, Ohio, and Ethel Skirvin.	Appeal from the Supreme Court of the State of Ohio.

[January 2, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

These appeals present the same question of substantive law and will be dealt with in a single opinion.

In No. 68 the appellees sought an injunction against the taxing officials of Cuyahoga County, Ohio, and those of the City of Cleveland, to restrain them from attempting to assess and collect taxes, pursuant to the laws of Ohio, on lands acquired by condemnation and owned by the appellees in the city and county. A preliminary injunction was issued but, pursuant to stipulation, the court proceeded at once to hear the case on the merits, and entered a final injunction.[1]

The lands involved were acquired by the United States by condemnation under the National Recovery programme for low-cost housing projects. The Federal Public Housing Authority then erected low-cost dwelling units which were leased to Cleveland

[1] 52 F. Supp. 906.

Metropolitan Housing, a State of Ohio authority. The latter has sublet the units to tenants for residence purposes.

The appellant contended that the United States Housing Act of September 1, 1937,[2] is unconstitutional, because Congress has no power under the Constitution to establish low-cost housing projects.

A majority of the court below held the federal statute authorized by the Constitution.[3] Its reasoning was that even though the evils of bad housing are local in their origin, their effect may become so widespread as to create a menace to the national welfare and that Congress is empowered to deal with the subject in that aspect. The dissenting judge was of the view that the project amounted merely to an embarkation by the federal Government in a private business and that the Government could not do this in such a way as to immunize the property employed from normal state taxation to support local police and other services required by the community of which the housing project forms a part.

In No. 69 the appellees sought and were awarded an injunction against the collection of local taxes under like circumstances.

In No. 388, the United States Housing Authority applied for exemption from local property taxes pursuant to the law of Ohio[4], in respect of a housing project in Cincinnati. The real estate had been purchased by the United States and devoted to a low-cost housing project pursuant to the federal statute.[5] The application was denied. Appeal was taken to the Supreme Court of Ohio.[6] The denial was affirmed on the grounds that no exemption was permitted by the constitution and statutes of the State and that refusal of the claimed exemption was consistent with the federal Constitution.[7] An appeal to this court was perfected.

Nos. 58 and 69 were heard and decided by a district court of three judges pursuant to § 266 of the Judicial Code.[8] The appellants insist that they do not act as officers of the State in the enforcement or execution of any state statute in collecting the taxes in question, and that § 266 therefore confers no jurisdiction on a three-judge court to hear the cause. We overrule this contention.

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2 42 U. S. C. 1401 ff.
3 Art. I, § 8, cl. 1.
4 Ohio General Code, §§ 5616, 5570-1.
5 *Supra*, note 2.
6 Pursuant to §§ 1464, 1464-1 Ohio General Code (1942 Supp.).
7 143 Ohio St. 251; 55 N. E. (2d) 265.
8 28 U. S. C. 380.

The section is inapplicable to suits challenging local ordinances or statutes having only local application.[9] But these cases involve state law the application of which is state-wide.[10] If the taxing officials were, in those instances, though acting under such a law, doing so as local officials and on behalf of the locality and not as officers of the state, the section is inapplicable to suits to restrain them.[11] Here, however, the officials were enforcing state laws embodying a state-wide concern and in the State's interest, and in such a case Section 266 is applicable.[12] The jurisdiction of a court of three judges was properly invoked.

Little need be said concerning the merits. Section 1 of the Housing Act[13] declares a policy to promote the general welfare of the Nation by employing its funds and credit to assist the States and their political subdivisions to relieve unemployment and safeguard health, safety and morals of the Nation's citizens by improving housing conditions. Section 5[14] provides in part, "The Authority, including but not limited to its franchise, capital, reserves, surplus, loans, income, assets, and property of any kind, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, county, municipality, or local taxing authority." Section 13 authorizes agreements by the Authority to pay annual sums, not exceeding taxes which would otherwise be paid, in lieu of taxes.[15]

Challenge of the power of Congress to enact the Housing Act must fail.[16] And Congress may exempt property owned by the United States or its instrumentality from state taxation in furtherance of the purposes of the federal legislation. This is settled by such an array of authority that citation would seem unnecessary.[17]

The judgments in Nos. 68 and 69 are affirmed and that in No. 388 is reversed.

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[9] Ex parte Collins, 277 U. S. 565; Ex parte Public National Bank, 278 U. S. 101; Rorick v. Board of Commissioners, 307 U. S. 208.

[10] See Ohio General Code §§ 5328, 5351.

[11] Ex parte Collins, *supra*; Ex parte Public National Bank, *supra*.

[12] Spielman Motor Co. v. Dodge, 295 U. S. 89; Rorick v. Board of Commissioners, *supra*, 212.

[13] 42 U. S. C. 1401.

[14] U. S. C. 1405(e).

[15] 42 U. S. C. 1413.

[16] United States v. Butler, 297 U. S. 1, 64-67; Steward Machine Co. v. Davis, 301 U. S. 548, 586; Helvering v. Davis, 301 U. S. 619, 640.

[17] See, e. g. Van Brocklin v. Tennessee, 117 U. S. 151; Pittman v. Home Owners' Loan Corp., 308 U. S. 21; Federal Land Bank v. Bismarck Lumber Co., 314 U. S. 95.